

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 221.

DULUTH AND IRON RANGE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JOSEPH H ROY.

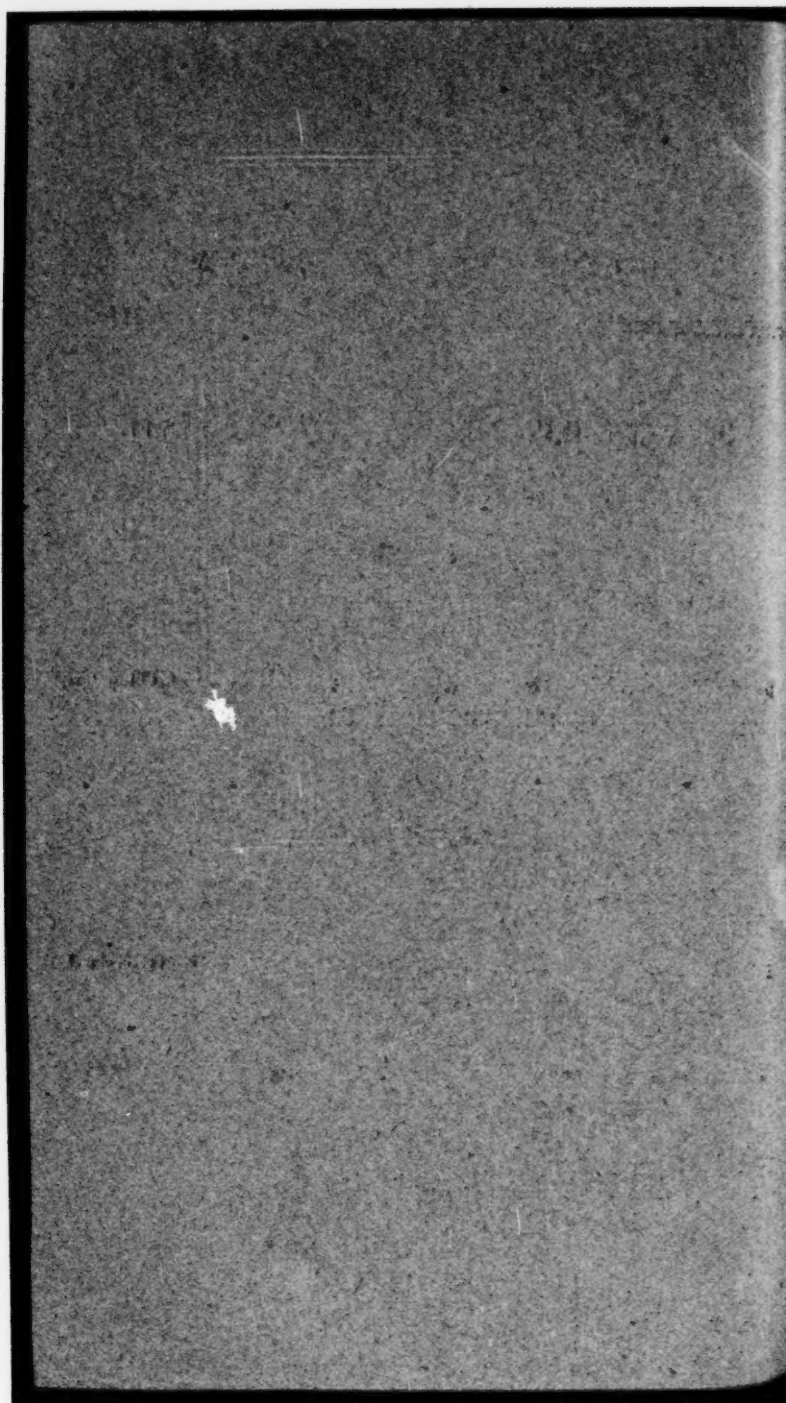
IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED DECEMBER 28, 1897.

(16,764.)

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(16,764.)

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1 STATE OF MINNESOTA, { ss :
County of St. Louis, }

Thos. J. Davis, being first duly sworn, says: I am upwards of twenty-one years of age, reside at No. 301 West Third street, in the city of Duluth, in said county, and am personally acquainted with John Jenswold, Jr., the attorney of Joseph Roy, named as defendant in error in the within and annexed citation. On the 6th day of December, 1897, I served the within citation upon the aforesaid John Jenswold, Jr., as attorney for said Joseph Roy, defendant in error, by delivering a true copy of said citation to said John Jenswold, Jr., in said city of Duluth, and at the same time I exhibited to him, said John Jenswold, Jr., the attached original citation, with the signature of the chief justice of the State of Minnesota thereon, and the signature to the admission of service indorsed upon the back of said original citation is the original signature of said John Jenswold, Jr.

THOS. J. DAVIS.

Subscribed and sworn to before me this 7th day of December, A. D. 1897.

[Notarial Seal, St. Louis Co., Minn.]

CARRIE C. NOYES,
Notary Public, St. Louis Co., Minn.

2 Citation.

The United States of America to Joseph Roy, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on the 31st day of December, 1897, pursuant to a writ of error filed in the office of the supreme court of the State of Minnesota, wherein Duluth & Iron Range Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 4th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

3 [Endorsed:] United States of America, ss: Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error. Citation. Service of the within citation, by copy, at the city of Duluth, State of Minnesota, this 6th day of December, A. D. 1897, is hereby admitted. Jno. Jenswold, Jr., attorney for Joseph Roy, defendant in error.

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph Roy, respondent, and Duluth & Iron Range Railroad Company, John Megins, and Moses D. Kenyon, appellants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Duluth & Iron Range Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

5 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 31st day of December, 1897, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal U. S. Circuit Court, Third Division, Dist. of Minnesota.]

HENRY D. LANG,

*Clerk of the Circuit Court of the United States
for the District of Minnesota.*

Allowed by—

CHAS. M. START,

*Chief Justice of the Supreme Court
of the State of Minnesota.*

6 [Endorsed:] Original. United States Supreme Court.
The Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error. Writ of error.

7 STATE OF MINNESOTA :

Supreme Court, October Term, 1897.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, Appellant, and
John Megins and Moses B. Kenyon, Defendants. }*Assignments of Error.*

1. The facts found do not support the conclusions of law.
2. The court erred in finding as conclusion of law from the facts found, that plaintiff is the equitable owner of the land in question on this appeal, to wit, the north half of the land described in the complaint. (Paper Book, fol. 7.)
3. The court erred in finding as a conclusion of law, on the facts found, that plaintiff was entitled to judgment declaring him to be the equitable owner of the said land.
4. The court erred in ordering judgment on the facts in favor of plaintiff, for the reason,
 - a. That the legal title to the land in question, the north half of the land described in the complaint, was vested in the appellant, and there is no finding that there was any mistake of law or fraud on the part of the General Land Office of the United States or any officer of the United States.
 - b. The finding that the patent to the State of Minnesota, through which appellant acquired the legal title, was issued "through a mistake and inadvertence," does not constitute any ground for adjudging plaintiff the equitable owner of the land or entitled to judgment.
 - c. That plaintiff is not the real party in interest, and never had any legal or equitable interest in the land, the United States being the only party which could question or attack the action of the officers of the General Land Office of the United States in issuing the patent, to set it aside or to determine its effect, validity or party in whom it vested, either legal or equitable title.

9 Know all men by these presents that the Duluth & Iron Range Railroad Company, a corporation organized under the laws of the State of Minnesota, as principal, and B. P. Crane and J. L. Greatsinger, as sureties, are held and firmly bound unto Joseph Roy in the sum of five thousand dollars, to be paid to the said Joseph Roy; for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this second day of December, in the year of our Lord eighteen hundred and ninety-seven.

Whereas a judgment was entered in the supreme court of the State of Minnesota on the 16th day of November, 1897, in a suit there pending between Joseph Roy, plaintiff, and said Duluth & Iron Range Railroad Company and John Megins and Moses D.

Kenyon, defendants, in favor of said plaintiff and against said defendants, and the said Duluth & Iron Range Railroad Company having applied for a writ of error from the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and wishing said writ to be a supersedeas:

Now, therefore, the condition of this obligation is such that if the above-named Duluth & Iron Range Railroad Company shall prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain of full force and virtue.

DULUTH & IRON RANGE [SEAL.]
RAILROAD COMPANY,
By J. L. GREATSINGER, *President*.
B. P. CRANE. [SEAL.]
J. L. GREATSINGER. [SEAL.]

Signed, sealed, and delivered in presence of—

THOS. J. DAVIS.
ALICE BROAD.

10 STATE OF MINNESOTA, }
County of St. Louis, } ss:

On this 2nd day of December, A. D. 1897, before me appeared J. L. Greatsinger, to me personally known, who, being by me duly sworn, did say that he is the president of Duluth & Iron Range Railroad Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was so signed and sealed in behalf of said corporation by said J. L. Greatsinger by authority of its board of directors, and said J. L. Greatsinger acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

THOS. J. DAVIS,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss:

On this 2nd day of December, A. D. 1897, before me, a notary public within and for said county, personally appeared B. P. Crane and J. L. Greatsinger, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.]

THOS. J. DAVIS,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss:

B. P. Crane and J. L. Greatsinger, being duly sworn, say, each for himself, that he is one of the sureties above named; that he is a resi-

11

B. P. CRANE.

J. L. GREATSINGER.

1897.

[NOTARIAL SEAL.]

THOS. J. DAVIS.

Notary Public, St. Louis Co., Minn.

12

13

Supreme Court, October Term, 1897.

STATE OF MINNESOTA,)

St. Louis County.

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

against

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS,

Defendants.

Summons.

The State of Minnesota to the above-named defendants :

You and each of you are hereby summoned and required to an-

14 answer the complaint of the plaintiff in the above-entitled action, which complaint has been filed in the office of the clerk of said district court, at the city of Duluth, county of St. Louis and State of Minnesota, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the city of Duluth in the said county of St. Louis, within twenty days after service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in said complaint, together with plaintiff's costs and disbursements herein.

Dated June 18th, A. D. 1894.

JNO. JENSWOLD, JR.,

Plaintiff's Attorney, No. 306 Palladio Bldg., Duluth, Minn.

STATE OF MINNESOTA, }
 County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS,
 Defendants. }

Complaint.

Plaintiff for cause of action says :

That the defendant The Duluth & Iron Range Railroad Company is now and during all the times hereinafter stated has been a corporation duly organized and created under the laws of the State of Minnesota, under which it was incorporated, and as such has been engaged in the operation of a railroad in this State.

15 That plaintiff is the owner and in possession by himself of the following-described premises situated in St. Louis county, Minnesota, to wit :

The northwest quarter (N. W. $\frac{1}{4}$) of section No. three (3) in township No. sixty-one (61), north of range No. fifteen (15), west of the 4th P. M.

That the defendants claim an estate or interest therein adverse to the plaintiff.

That this action is brought for the purpose of determining such adverse claim, estate or interest.

Wherefore, plaintiff demands that defendants set up their claim, estate or interest therein, and that the court adjudge and decree that plaintiff is the sole and absolute owner of said premises, and that the title thereto is in him, and that he have judgment against the defendants for his costs and disbursements herein and such other and further relief as to the court shall seem proper.

JNO. JENSWOLD, JR.,

Attorney for Plaintiff, 306 Palladio Bldg., Duluth, Minn.

JOHN BRENNAN,

Of Counsel for Plaintiff.

STATE OF MINNESOTA, }
 County of St. Louis, } ss :

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action ; that the within complaint is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JOSEPH ROY.

16 Subscribed and sworn to before me this 13th day of June,
 A. D. 1894.

[NOTARIAL SEAL.]

JNO. JENSWOLD, JR.,

Notary Public, St. Louis County, Minn.

Filed in my office at — o'clock — m., June 18th, 1894.

D. J. SINCLAIR,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss.

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS,
Defendants. }

Separate Answer of Duluth & Iron Range Railroad Company.

Duluth & Iron Range Railroad Company, for its separate answer to the complaint of plaintiff:

1. Denies each and every allegation in said complaint, except such as are hereinafter expressly admitted or otherwise stated.

2. This defendant admits that it is, and during all the time mentioned in the complaint has been, a corporation under the laws of the State of Minnesota, engaged in the operation of a railroad.

3. And upon information and belief, denies that plaintiff is in possession of the north half of the northwest quarter of section three, township sixty-one, north of range fifteen, west of the fourth principal meridian of the State of Minnesota; and

4. Alleges that it, said Duluth & Iron Range Railroad Company, is and at the time said action was commenced was the owner in fee-simple and entitled to the possession of, all of the above-described lands, being the north half of the lands mentioned in the complaint, and that plaintiff has no title to, interest in or lien upon the lands hereinbefore described.

Wherefore, defendant Duluth & Iron Range Railroad Company demands judgment:

1. That it is the owner in fee-simple of said north half of the northwest quarter of section three, township sixty-one, north of range fifteen, west of the fourth principal meridian; and

That plaintiff has no title to, interest in or lien upon said lands or any part thereof.

2. For the costs and disbursements of this action.

DRAPER, DAVIS & HOLLISTER,

*Attorneys for Defendant Duluth &
Iron Range Railroad Company.*

STATE OF MINNESOTA, }
County of St. Louis, } ss.

J. L. Greatsinger came before me personally, and being duly sworn doth say that he is an officer, to wit, president and general manager, of defendant Duluth & Iron Range Railroad Company in the above-

entitled action; that the foregoing separate answer is true of his own knowledge, except as to those matters therein stated on his information and belief, and, as to those matters, that he believes it to be true.

J. L. GREATSINGER.

Subscribed and sworn to before me on this 7th day of July, A. D. 1894.

[NOTARIAL SEAL.]

THOS. J. DAVIS,
Notary Public, St. Louis Co., Minn.

Due service of the within separate answer of the Duluth & Iron Range railroad by copy is hereby admitted at the city of Duluth, Minn., this 7th day of July, 1894.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

Filed in my office at — o'clock, — m., July 13th, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

The defendant herein, John Megins, for his separate answer to the complaint of the plaintiff in the above-entitled action, denies each and every allegation of said complaint not hereinafter admitted.

19 This defendant alleges:

That at the commencement of this action he was and is now the owner in fee-simple of an undivided three-quarters of that piece or parcel of land situated in the county of St. Louis and State of Minnesota, and described as follows: The south half of the north-west one-quarter of section No. three (3), in township No. sixty-one (61), north of range No. fifteen (15), west of the fourth P. M.

That the said piece or parcel of land was at the commencement of this action, and is now, vacant and unoccupied.

Wherefore, this defendant asks that the plaintiff take nothing by this action, and that this defendant be adjudged to be the owner in fee-simple of an undivided three-quarters of the said piece or parcel of land, and that the adverse claim of the plaintiff thereto be forever barred and determined, and this defendant have judgment for his costs and disbursements herein.

Dated at Duluth, June 27, 1894.

WM. B. PHELPS,
Attorney for Defendant Megins.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

John Megins being first duly sworn upon oath says that he is one of the defendants in the foregoing within-entitled action; that he has heard read the foregoing answer, that the same is true to his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

JOHN MEGINS.

20 Subscribed and sworn to before me this 29th day of June, 1894.

[NOTARIAL SEAL.]

WM. B. PHELPS,
Notary Public, St. Louis Co., Minn.

Due service of the within answer, by copy, is hereby admitted at Duluth, Minn., this 7th day of July, 1894.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

Filed in my office at — o'clock, — m., October 3, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By F. R. MILLAR, Deputy.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Reply to the Answer of Duluth & Iron Range Railroad Company.

Comes now the plaintiff and for reply to the answer of Duluth & Iron Range Railroad Company says :

21 He denies each and every statement and allegation therein contained and each and every part thereof, whether as therein alleged or otherwise, except such as is specifically admitted and so pleaded in the complaint herein.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff, No. 306 Palladio Bldg., Duluth, Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters, that he believes it to be true.

Subscribed and sworn to before me this 18th day of July, A. D. 1894.

[SEAL.]

JNO. JENSWOLD, JR.,
Notary Public, St. Louis County, Minn.

Due service of the within reply, by receipt of copy thereof, at Duluth, Minnesota, is hereby admitted this 18th day of July, 1894.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Def't D. & I. R. R. Co.

Filed in my office, at — o'clock — m., Oct. 3, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By F. R. MILLAR, Deputy.

22 STATE OF MINNESOTA, } ss:
County of St. Louis, }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,
vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants.

Reply.

Comes now the plaintiff and for reply to the answer of John Megins says:

He denies each and every statement and allegation therein contained and each and every part thereof, whether as therein alleged or otherwise, except such as is specifically admitted and so pleaded in the complaint herein.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff, No. 306 Palladian Bldg., Duluth, Minn.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters, that he believes it to be true.

Subscribed and sworn to before me this — day of July, A. D. 1894.

[SEAL.]

Notary Public, St. Louis County, Minn.

23 Due service of the within reply, by receipt of copy thereof, at Duluth, Minnesota, is hereby admitted this 18th day of July, 1894.

WM. B. PHELPS,
Attorney for Def't Megins.

Filed in my office at — o'clock, — m., Oct. 3, 1894.

D. J. SINCLAIR,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Motion.

Comes now the above-named plaintiff and moves the court for an order that he be granted permission to serve and file the attached amended reply herein.

This motion is based upon the following affidavits, which are made a part hereof.

JNO. JENSWOLD, Jr.,

JOHN BRENNAN,

Attorneys for Plaintiff.

24 *Affidavit of Merits.*

STATE OF MINNESOTA, }
County of St. Louis, } ss :

Joseph Roy, being duly sworn, upon oath says: That he is the plaintiff in the above entitled action; that he has fully and fairly stated the case and facts in the case to his counsel; that he has a good and substantial defense to the defendants' claim of ownership and title, on the merits, and also has a substantial cause of action on the merits, as he is advised by his counsel after such statement and verily believes true; that the names and places of residence of such counsel are John Brennan, West Superior, Wisconsin, and John Jenswold, Jr., Duluth, Minnesota; that the attached is the proposed amended reply which he seeks to have allowed and filed herein

JOSEPH ROY.

Subscribed and sworn to before me this 4th day of October, 1894.

JNO. JENSWOLD, JR.,

Notary Public, St. Louis Co.

[NOTARIAL SEAL.]

STATE OF MINNESOTA, }
County of St. Louis, } ss :

John Jenswold, Jr., and John Brennan, being each duly sworn, each for himself deposes and says: That he is the attorney and counsel of the plaintiff in the above-entitled case, and that from a

statement of the case in this action made to the deponents by the plaintiff, and from the official records and certified copies
 25 of records, deponents verily believe that plaintiff has a good and substantial defense on the merits to the causes of action set forth in the answers of the defendants, and that plaintiff has a good and substantial cause of action on the merits.

That the reason why this application for leave to file an amended reply was not sooner made, and the facts therein set forth inserted in the original reply, was that the plaintiff had employed and retained as his attorney to prosecute this action the said John Brennan, who is a duly licensed and practicing attorney of the State of Wisconsin, residing at West Superior in said State; that a few days prior to the commencement of this action the said Brennan procured said Jenswold to appear as the attorney of record and to institute this action.

That at said time the said Jenswold was informed, in a general way, that plaintiff desired to commence an action to determine the adverse claims of title to the lands in controversy, and that an equitable action should be brought to determine the claims of the defendants; that said Jenswold did then and there state that by bringing an action under the statute to determine the adverse claims and alleging possession, all claims of title whether legal or equitable could be determined therein; that said Brennan relied upon said advice so given and instructed him to commence said action accordingly.

That said Jenswold did thereupon draw the complaint herein, commence this action and draw and serve the original reply, and cause the same to be filed herein without knowing anything further about the facts set forth in the proposed amended reply than said
 26 general statement as aforesaid made to him by said Brennan, and that plaintiff was in possession of said land and that the same was not swamp land, and that he claimed to be the owner by virtue of certain proceedings theretofore had in the Land Department at Washington, the nature and character of which he was ignorant.

That said Jenswold relied upon said Brennan to try said cause and to procure the necessary evidence, and did for that reason make no inquiries in reference thereto. Affiant Brennan further deposes and says that he relied upon said Jenswold preparing the pleadings and selecting the proper form of action in this matter as aforesaid to determine the title to said land, and not until on the 3d day of October, 1894, did he see the original reply herein, but he did at all times prior thereto believe that a sufficient and proper reply had been made upon which all issues could be tried, the same as if an equitable action had been brought, and all the facts of the case set forth; that he was ignorant of the rules of pleadings and practice of the State of Minnesota, and relied solely upon said Jenswold having properly drawn the pleadings in said action, and for these reasons he did not cause the same to be investigated; that on said October 3, 1894, said Jenswold in consultation with said Brennan was informed of the nature and character of the evidence, whereupon said

Brennan expressed doubts about the sufficiency of the reply to admit said evidence, and thereupon these affiants concluded that it was necessary to make and serve the proposed amended reply which was accordingly prepared, but was not completed within time to serve the same upon defendants' counsel until this morning.

27 That unless this proposed amended reply is allowed, affiants verily believe that it will result in injustice to the said client, this plaintiff, and that he will not be able under the rules of evidence to properly present all the necessary and material facts bearing upon the case, and by reason thereof, that great injustice will be done and the plaintiff's title and rights to said property imperilled.

That further affiants sayeth not, except that they make this affidavit and application for the purpose of being permitted to file this their amended reply.

JNO. JENSWOLD, JR.
JOHN BRENNAN.

Subscribed and sworn to before me this 4th day of October, 1894.

HENRY S. MAHON,

[NOTARIAL SEAL.]

Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN ME-
gins, Defendants. }

Amended and Substituted Reply.

Plaintiff above named, replying to the answer of the Duluth & Iron Range Railroad Company herein, respectfully shows to the court and alleges :

28

I.

He denies each and every allegation in said answer contained.

II.

Plaintiff further alleges, that on or about the 26th day of May, 1883, the plaintiff being then and there qualified to enter the land mentioned and described in the complaint herein, as a homestead under the laws of the United States, and with the intention of entering the same as a homestead, made settlement thereon, and immediately thereafter established his residence on said land, and has ever since resided and now resides thereon, and during all of said time has been, and now is, in the actual, exclusive and notorious possession of the same. That when the plaintiff commenced his residence on said land, the plat of the township in which said lands

were situated had not been filed in the land office at Duluth, that being the land office of the district in which said land was situated, and on account thereof he was unable to enter said land. That on or about the 2nd day of July, 1883, after the plat of the survey of said township was filed in said land office, the plaintiff went thereto with the intention of entering said land as a homestead, and presented his application to make homestead entry thereof, which was refused, and was then and there informed by the land officers of said land office that there had been a mistake made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests

29 then filed in said office against said survey, and that these were sufficient to raise the question as to the accuracy of said survey, and that it would be unnecessary for the plaintiff to protest or object to said survey, and for him to wait until the protests already made against the same be determined. That the plaintiff relied upon the representations so made by said officers, and for that reason did not at said time appeal from the rejection of his said application to enter said land, but returned to live thereon. That at said time he did not thoroughly understand the English language, being a foreigner by birth, was unfamiliar and unacquainted with the laws, rules, and regulations relating to the disposition of the public lands, and relied upon what said land officers told him as aforesaid. That on the 5th day of August, 1884, the plaintiff having discovered that said lands were claimed by the State of Minnesota as swamp lands, duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making said entry; that at said time no adverse claim had arisen in reference to said land, or was filed in said office; that the said local land officers unlawfully rejected the plaintiff's said application to enter said land on the ground that said land enured to the State of Minnesota under the act of March 12th, 1860, and that his application to enter said land was not made within three months after the filing of the township plat in said office. That on the 6th day of August, 1884, the plaintiff duly filed in said local land office his affidavit, duly corroborated by two witnesses, setting forth that said land

30 was not swamp land or wet and unfit for cultivation, but that the same was all, with the exception of four or five acres, in the northwest quarter thereof, high, dry and fit for cultivation; and founded on said affidavit corroborated as aforesaid on the 26th day of August, 1884, duly appealed from the rejection of said application to enter said land as a homestead by the said local land officers, unto the Commissioner of the General Land Office, which appeal with said affidavit was, by said local land officers, on the 26th day of August, 1884, duly transmitted to the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said land as a homestead, and his said contest of the claim of the State of Minne-

sota to said lands as swamp lands, was pending and undetermined in the General Land Office, through inadvertence and mistake, they were overlooked, and the lands inadvertently and through mistake unlawfully patented to the State of Minnesota.

That the plaintiff by his settlement, improvements and residence upon said land, and his said application to enter the same as a homestead, and his appeal from the rejection thereof, and his said contest of the claim of the State of Minnesota thereto, acquired a right to be preferred in the acquisition of said land from the United States, and by virtue thereof and of the premises became, was and now is the equitable owner thereof. That by said patent to the State of Minnesota, the apparent legal title to said
31 lands unlawfully passed thereto, when in equity the plaintiff was and is entitled to said lands. That the defendant The Duluth & Iron Range Railroad Company claims title to lands by virtue of an alleged grant of said lands by said State. That it took said conveyances of said land with actual notice of the plaintiff's rights thereto and with knowledge that the plaintiff was in possession of said lands, and claimed title thereto. That by said patent of said lands by the United States to the State of Minnesota, and said grant by the State of Minnesota to the Duluth & Iron Range Railroad Company, no valid title whatever to said lands passed into said State or unto said railroad company.

III.

That the lands at the time of the swamp-land act of September 28, 1850, was extended to the State of Minnesota, to wit, on March 12, 1860, were not, never since have been, nor now are, swamp or overflowed or unfit for cultivation; but on the contrary high, dry, and fit for cultivation, all of which the defendant The Duluth & Iron Range Railroad Company had notice when it took a conveyance of said lands.

Wherefore plaintiff demands judgment as prayed for in the complaint herein.

JNO. JENSWOLD, JR., AND
JNO. BRENNAN,

Attorneys for Plaintiff, 306 Palladio Bldg., Duluth, Minn.

32 STATE OF MINNESOTA, }
County of St. Louis, } ss:

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JOSEPH ROY.

Subscribed and sworn to before me this 3d day of October, A. D. 1894.

JNO. JENSWOLD, JR.,
[NOTARIAL SEAL.] Notary Public, St. Louis County, Minn.

Due service of the within notice and reply, by receipt of copy thereof, Duluth, Minnesota, is hereby admitted this 4th day of October, 1894.

Attorney for Defendant Duluth & I. R. R. Co.

Filed in my office at — o'clock, — m., October 4, 1894.

D. J. SINCLAIR,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

33 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Motion.

Comes now the above-named plaintiff and moves the court for an order that he be granted permission to serve and file the attached amended reply herein.

This motion is based upon the following affidavits, which are made a part hereof.

JNO. JENSWOLD, JR.,

JOHN BRENNAN,

Attorneys for Plaintiff.

Affidavit of Merits.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

Joseph Roy, being duly sworn, upon oath says: That he is the plaintiff in the above-entitled action; that he has fully and fairly stated the case and facts in the case to his counsel; that he has a good and substantial defense to the defendants' claim of ownership and title, on the merits, and also has a substantial cause of action on the merits, as he is advised by his counsel after such statement and verily believes true; that the names and places of residence of such counsel are John Brennan, West Superior, Wisconsin, and

34 John Jenswold, Jr., Duluth, Minnesota; that the attached is the proposed amended reply which he seeks to have allowed and filed herein.

JOSEPH ROY.

Subscribed and sworn to before me this 4th day of October, 1894.

JNO. JENSWOLD, JR.,

[NOTARIAL SEAL.]

Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

John Jenswold, Jr., and John Brennan, being each duly sworn, each for himself deposes and says: That he is the attorney and counsel of the plaintiff in the above entitled case, and that from a statement of the case in this action made to the deponents by the plaintiff, and from the official records and certified copies of records, deponents verily believe that plaintiff has a good and substantial defense on the merits to the causes of action set forth in the answers of the defendants, and that plaintiff has a good and substantial cause of action on the merits.

That the reason why this application for leave to file an amended reply was not sooner made, and the facts therein set forth inserted in the original reply, was that the plaintiff had employed and retained as his attorney to prosecute this action the said John Brennan, who is a duly licensed and practicing attorney of the State of Wisconsin, residing at West Superior, in said State; that a few days prior to the commencement of this action the said Brennan procured said Jenswold to appear as the attorney of record and to institute this action.

That at said time the said Jenswold was informed, in a general way, that plaintiff desired to commence an action to determine the adverse claims of title to the lands in controversy, and that an equitable action should be brought to determine the claims of the defendants; that said Jenswold did then and there state that by bringing an action under the statute to determine the adverse claims and alleging possession, all claims of title whether legal or equitable could be determined therein; that said Brennan relied upon said advice so given and instructed him to commence said action accordingly.

That said Jenswold did thereupon draw the complaint herein, commence this action and draw and serve the original reply, and cause the same to be filed herein without knowing anything further about the facts set forth in the proposed amended reply than said general statement as aforesaid made to him by said Brennan, and that plaintiff was in possession of said land and that the same was not swamp lands, and that he claimed to be the owner by virtue of certain proceedings theretofore had in the Land Department at Washington, the nature and character of which he was ignorant.

That said Jenswold relied upon said Brennan to try said cause and to procure the necessary evidence, and did for that reason make no inquiries in reference thereto. Affiant Brennan further deposes and says that he relied upon said Jenswold preparing the pleadings and selecting the proper form of action in this matter as aforesaid to determine the title to said land, and not until on the 3d day of October, 1894, did he see the original reply herein, but he did at all times prior thereto believe that a sufficient and proper reply had been made upon which all issues could be tried, the same as if an equitable action had been brought, and all

the facts of the case set forth; that he was ignorant of the rules of pleadings and practice of the State of Minnesota, and relied solely upon said Jenswold having properly drawn the pleadings in said action, and for these reasons he did not cause the same to be investigated; that on said October 3, 1894, said Jenswold in consultation with said Brennan was informed of the nature and character of the evidence, whereupon said Brennan expressed doubts about the sufficiency of the reply to admit said evidence, and thereupon these affiants concluded that it was necessary to make and serve the proposed amended reply which was accordingly prepared, but was not completed within time to serve the same upon defendants' counsel until this morning.

That unless this proposed amended reply is allowed, affiants verily believe that it will result in injustice to the said client, this plaintiff, and that he will not be able under the rules of evidence to properly present all the necessary and material facts bearing upon the case, and by reason thereof, that great injustice will be done and the plaintiff's title and rights to said property imperilled.

That further affiants sayeth not, except that they make this affidavit and application for the purpose of being permitted to file this their amended reply.

JNO. JENSWOLD, JR.
JOHN BRENNAN.

Subscribed and sworn to before me this 4th day of October, 1894.

HENRY S. MAHON,
[NOTARIAL SEAL.] *Notary Public, St. Louis Co., Minn.*

37 STATE OF MINNESOTA, }
County of St. Louis, } ss:

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff, }
vs. }
DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Amended and Substituted Reply.

Plaintiff above named, replying to the answer of John Megins herein, respectfully shows to the court and alleges:

I.

He denies each and every allegation in said answer contained.

II.

Plaintiff further alleges, that on or about the 26th day of May, 1883, the plaintiff being then and there qualified to enter the land mentioned and described in the complaint herein, as a homestead under the laws of the United States, and with the intention of enter-

ing the same as a homestead, made settlement thereon, and immediately thereafter established his residence on said land, and has ever since resided and now resides thereon, and during all of said time has been, and now is, in the actual, exclusive and notorious possession of the same. That when the plaintiff commenced his residence on said land, the plat of the township in which said lands were situated had not been filed in the land office at Duluth, that being the land office of the district in which said land was situated, and

on account thereof he was unable to enter said land. That on 38 or about the 2nd day of July, 1883, after the plat of the survey of said township was filed in said land office, the plaintiff went thereto with the intention of entering said land as a homestead, and presented his application to make homestead entry thereof, which was refused, and was then and there informed by the land officers of said land office that there had been a mistake made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests then filed in said office against said survey, and that these were sufficient to raise the question as to the accuracy of said survey, and that it would be unnecessary for the plaintiff to protest or object to said survey, and for him to wait until the protests already made against the same be determined. That the plaintiff relied upon the representations so made by said officers, and for that reason did not at said time appeal from the rejection of his said application to enter said land, but returned to live thereon. That at said time he did not thoroughly understand the English language, being a foreigner by birth, was unfamiliar and unacquainted with the laws, rules and regulations relating to the disposition of the public lands, and relied upon what said land officers told him as aforesaid. That on the 5th day of August, 1884, the plaintiff having discovered that said lands were claimed by the State of Minnesota as swamp lands, duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making said entry; that at said time no adverse claim had arisen in reference to said land, or was filed in said office;

39 that the said local land officers unlawfully rejected the plaintiff's said application to enter said land, on the ground that said land enured to the State of Minnesota under the act of March 12th, 1860, and that his application to enter said land was not made within three months after the filing of the township plat in said office. That on the 6th day of August, 1884, the plaintiff duly filed in said local land office his affidavit, duly corroborated by two witnesses, setting forth that said land was not swamp land or wet and unfit for cultivation, but that the same was all, with the exception of four or five acres, in the northwest quarter thereof, high, dry and fit for cultivation; and founded on said affidavit corroborated as aforesaid on the 26th day of August, 1884, duly appealed from the rejection of said application to enter said land as a homestead by the said local land officers, unto the Commissioner of the General Land Office, which appeal with said affidavit was, by said local land officers, on the 26th day of August, 1884, duly transmitted to

the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said lands as a homestead, and his said contest of the claim of the State of Minnesota to said lands as swamp lands, was pending and undetermined in the General Land Office, through inadvertence and mistake, they were overlooked, and the lands inadvertently and through mistake unlawfully patented to the State of Minnesota.

40 That the plaintiff by his settlement, improvements and residence upon said land, and his said application to enter the same as a homestead, and his appeal from the rejection thereof, and his said contest of the claim of the State of Minnesota thereto, acquired a right to be preferred in the acquisition of said land from the United States, and by virtue thereof and of the premises became, was and now is the equitable owner thereof. That by said patent to the State of Minnesota, the apparent legal title to said lands unlawfully passed thereto, when in equity the plaintiff was and is entitled to said lands. That the defendant John Megins claims title to said lands by virtue of an alleged grant of said lands by said State, made by act of March 8th, 1861, and by mesne conveyances from grantees of said State unto him. That he took said conveyances of said land with actual notice of the plaintiff's rights thereto and with knowledge that the plaintiff was in possession of said lands and claimed title thereto. That by said patent of said lands by the United States to the State of Minnesota, and said grant by the State of Minnesota to the railroad company, and the said mesne conveyances unto the said John Megins, no valid title whatever to said lands passed unto said State, its grantee or the said John Megins.

III.

That the lands at the time the swamp-land act of September 28, 1850, was extended to the State of Minnesota, to wit, on March 12, 1860, were not, never since have been, nor now are, swamp or overflowed or unfit for cultivation; but on the contrary high, dry, and fit for cultivation, all of which the defendant John
41 Megins had notice when he took a conveyance of said lands.

Wherefore, plaintiff demands judgment as prayed for in the complaint herein.

JNO. JENSWOLD, JR., AND
JNO. BRENNAN,

Attorneys for Plaintiff, 306 Palladio Bldg., Duluth, Minn.

STATE OF MINNESOTA,)
County of St. Louis, } ss :

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge, except as to those

matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JOSEPH ROY.

Subscribed and sworn to before me this 3d day of October, A. D. 1894.

[NOTARIAL SEAL.] JNO. JENSWOLD, JR.,
Notary Public, St. Louis County, Minn.

Due service of the within reply, by receipt of copy thereof, Duluth, Minnesota, is hereby admitted this 4th day of October, 1894.

Attorney for Defendant John Megins.

Filed in my office at — o'clock, — m., October 4, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By W. A. KENNEDY, Deputy.

42 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,
vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

The defendant herein, John Megins, demurs to the new matter contained in the amended reply of the plaintiff in this cause, and to all that part of said amended reply consisting of new matter, and for ground of objection thereto specified that the said new matter, and all that part of said reply containing new matter, does not state facts sufficient to constitute a defense to the new matter alleged in the answer of this defendant.

Dated at Duluth, October 4, 1894.

WM. B. PHELPS,
Attorney for Defendant Megins.

Due service of the within demurrer by copy is hereby admitted at Duluth, Minn., this 4th day of October, 1894.

J. JENSWOLD, JR.,
Attorney for Defendant Megins.

Filed in my office at — o'clock — m., February 11, 1897.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, Deputy.

43 STATE OF MINNESOTA, {
County of St. Louis. }

In the District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

versus

DULUTH & IRON RANGE R. R. CO. and JOHN MEGGINS, Defendants. }

Order.

The above-entitled matter coming on to be heard before the court upon the demurrer of the defendant John Meggins to the new matter contained in the amended reply of the plaintiff, W. B. Phelps, Esq., appearing as counsel for said defendant, John Jenswold, Esq., and John Brennan, Esq., appearing as counsel for the plaintiff, said matter having been fully argued and submitted, it is

Ordered, that the said demurrer be and the same hereby is overruled.

Dated this 5th day of February, A. D. 1895.

By the court:

CHAS. L. LEWIS, *Judge.*

Filed in my office at — o'clock, — m., February 9, 1895.

JOHN OWENS,

Clerk of District Court,

By W. A. KENNEDY, *Deputy.*

44 STATE OF MINNESOTA, {
County of St. Louis, } ss:

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, Defendants. }

Motion for Order Bringing in Additional Parties Defendants, etc.

Comes now the above-named plaintiff and moves the court for an order requiring Moses D. Kenyon to appear and answer the complaint in this action, and that all further proceedings herein be stayed for such time as may be necessary to enable the plaintiff to have the said Kenyon brought into court to defend therein.

As grounds for the said motion the plaintiff refers to the pleadings on file herein and the attached affidavit, and makes the same a part hereof.

Plaintiff further alleges that it is necessary in order to have a full and just determination of this action that the said Moses D. Kenyon be made a party defendant herein.

JNO. JENSWOLD, JR.,

Attorney for Plaintiff, No. 306 Palladio Bldg. Duluth, Minn.

Affidavit.

STATE OF MINNESOTA, {
 County of St. Louis, } ss :

John Jenswold, Jr., being duly sworn, upon oath says that he is the attorney for plaintiff herein; that John Brennan, Esq., a
 45 non-resident attorney residing in the State of Wisconsin, is of counsel for plaintiff herein; that affiant prepared the complaint and summons and caused the same to be served and filed and this action to be commenced; that this action is still pending, and is now upon the calendar of the regular May, 1895, term of this court for trial; that this affiant upon commencing this action had no knowledge, notice or information that any other person than the defendants The Duluth & Iron Range Railroad Company and John Megins claimed any title or interest in any part of the land in controversy adverse to this plaintiff; that the defendant railroad company served and filed its answer claiming ownership in the north half of the northwest quarter of section three (3), township sixty-one (61), range fifteen (15), being a part of the land in controversy, and the defendant John Megins filed his answer and counter-claim against this plaintiff wherein he claimed to be the sole owner of the balance of the said lands in controversy, to wit, of the south half thereof; that accordingly this case was noticed for trial for the present term of this court, and thereafter on the 27th day of April, 1895, the deposition of the defendant Megins was, pursuant to a stipulation between these parties, taken, in which said deposition said Megins gave evidence and testified that he claimed the ownership of only an undivided three-fourths ($\frac{3}{4}$) of the said south-half of the lands in controversy, and that one Moses D. Kenyon claimed ownership in and to the other undivided one-fourth ($\frac{1}{4}$) of the said south half of said land in controversy; that said Kenyon is a resident of St. Paul, Minnesota; that the testimony necessary to sustain this action on
 46 behalf of the plaintiff is and will be the same as against each of the defendants herein and the said Kenyon, and the evidence and testimony of the said Kenyon to sustain his claim of title is and will be the same as that of his codefendant Megins and that of the defendant railroad company; that said Kenyon and these defendants all claim title to said lands through a swamp-land grant, whereas plaintiff claims title thereto by a separate chain, adverse and inconsistent with said swamp-land grant; that in order to have a full and just determination of this action, it is necessary that the said Kenyon be made a party defendant herein; that this affiant did not discover the extent of the claims of the defendant Megins to be less than the entire south half of the land in controversy, and he did not know that the said Kenyon claimed to be the owner of any interest in said land until the deposition of the said Megins had been taken; that this motion and affidavit is not made for delay, but is made in good faith and that the ends of justice may be served and the motion applied for granted.

JNO. JENSWOLD, JR.

Subscribed and sworn to before me this 3d day of May, A. D. 1895.

[NOTARIAL SEAL.] WM. R. SPENCER,
Notary Public, St. Louis Co., Minn.

Notice.

To the above-named defendants :

Please take notice : That the plaintiff will on May 6, 1895,
47 at 9.30 a. m., present the above and foregoing motion to one
of the judges of the above-entitled court, at the court-house
in the city of Duluth, Minnesota.

Dated May 2, 1895.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

Due service of the within notice, etc., by receipt of copy thereof,
Duluth, Minnesota, is hereby admitted this 3d day of May, 1895.

WM. B. PHELPS,
Attorney for Defendant Megins.
DRAPER, DAVIS & HOLLISTER,
Attorneys for Def't Railroad Co.

Filed in my office at — o'clock — m., May 6, 1895.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, *Deputy.*

STATE OF MINNESOTA, }
County of Ramsey, } ss :

Emanuel Johnson being first duly sworn, deposes and says that
at the city of St. Paul, county and State aforesaid, on the 7th day
of May, 1895, he served the attached order on the within-named
Moses D. Kenyon personally, by handing to and leaving with said
Moses D. Kenyon a true and correct copy thereof, and that at the
same time and place he exhibited to said Moses D. Kenyon, so that
he could see and read the same, the original signature of Honorable
Chas. L. Lewis, judge of the district court of St. Louis county, Min-
nesota, to said original.

EMANUEL JOHNSON.

48 Subscribed and sworn to before me this 7th day of May,
1895.

[NOTARIAL SEAL.] GEO. H. IRISH,
Notary Public, Ramsey County, Minn.

Fees \$1.20.

STATE OF MINNESOTA, }
County of St. Louis, } ss:

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Order.

Whereas, in the above-entitled action the plaintiff has moved for an order that Moses D. Kenyon be made a party defendant therein, in order that a full and just determination of said action might be had; and,

Whereas, a summons in said action, by which the same was commenced, was dated June 18th, 1894, and was duly served upon the above-named defendants on the same day, which said summons was in due and legal form, as required by statute, and required the defendants to answer the same within twenty days after date of such service, and in case of failure thereof that plaintiff would apply to the court for the relief demanded in his complaint which was then filed in said court

Now therefore, the court being fully advised in the premises, it is hereby

49 Ordered that Moses D. Kenyon be and he is hereby required to appear and answer the complaint in said summons named within twenty days after the service of this order upon him, exclusive of the day of such service, and in default thereof, the judgment and relief demanded in said complaint will be rendered against him in all respects as though the said Kenyon had been made a party to said action in the first instance.

It is further ordered that this order be forthwith served upon the said Kenyon in the manner required by law for the service of the summons in civil actions.

It is further ordered that all further proceedings in the above-entitled action be and the same is hereby stayed for the period of twenty-one days after the said Kenyon shall have been served with notice of this order in manner as provided by law; provided, however, that said stay shall at all events expire upon the serving by the said Kenyon of his answer herein in manner required by law.

Dated May 6, 1895.

By the court:

CHAS. L. LEWIS, *Judge.*

Received May 7, 1895.

CHAS. E. CHAPES, *Sheriff,*
By GEO. H. IRISH, *Deputy.*

Filed in my office at — o'clock — m., May 14, 1895.

JOHN OWENS,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

50 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS }
and M. D. Kenyon, Defendants. }

The defendant herein, M. D. Kenyon, for his separate answer to the complaint of the plaintiff in the above-entitled action, denies each and every allegation of said complaint not hereinafter admitted.

This defendant alleges:

That at the commencement of this action he was and is now the owner in fee-simple of an undivided one-quarter interest in that piece or parcel of land situated in the county of St. Louis and State of Minnesota and described as follows: The south half (S. $\frac{1}{2}$) of northwest quarter (N. W. $\frac{1}{4}$) of section three (3) in township sixty-one (61) north of range fifteen (15), west of 4th P. M.

That said piece or parcel of land was at the commencement of this action and is now vacant and unoccupied.

Wherefore, this defendant asks that plaintiff take nothing by this action, and that this defendant be adjudged to be the owner in fee-simple of an undivided one quarter interest in said piece or parcel of land, and that the adverse claim of the plaintiff thereto be forever barred and determined, and this defendant have judgment for his costs and disbursements herein.

Dated at Duluth, Minn., May 27th, 1895.

WM. B. PHELPS,
Attorney for Defendant Kenyon.

51 STATE OF MINNESOTA, }
County of St. Louis, } ss:

Wm. B. Phelps, being first duly sworn, upon oath says that he is the attorney for defendant Kenyon in the foregoing within-entitled action; that he has heard read the foregoing answer, that the same is true to his best knowledge, information and belief, and he believes it to be true; that the reason this verification is not made by said defendant is that he is absent from the county of St. Louis, where resides affiant, his said attorney.

WM. B. PHELPS.

Subscribed and sworn to before me this 27th day of May, 1895.

[SEAL.] THOS. J. McKEON,
Notary Public, St. Louis County, Minn.

Filed in my office at — o'clock, — m., September 25, 1895.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, *Deputy.*

52 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff herein and the defendant Kenyon, that the reply to the answer of the defendant Megins, heretofore served and filed in this case, be and the same stand to and be considered as the reply to the answer of the defendant Kenyon as fully to all effects and purposes as if a separate reply was made and served upon him.

Dated Duluth, Minn., May 31, 1895.

JNO. JENSWOLD, Jr.,

Attorney for Plaintiff.

WM. B. PHELPS,

Attorney for Defendant.

Filed in my office at — o'clock, — m., June 14, 1895.

JOHN OWENS,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

53 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

Findings of Facts and Conclusions of Law.

The above-entitled action having been tried before the undersigned, one of the judges of the above-entitled court, at the regular May A. D. 1895 term thereof, the parties thereto having submitted all their proofs and made their arguments by their respective counsel and finally submitted the same, and the court being fully advised in the premises, I hereby make and find the following as my

Findings of Facts.

1st. That on or about the 26th day of May, A. D. 1883, the plaintiff was duly qualified to enter Government lands under the homestead and pre-emption laws of the United States, and on the 9th day of June, 1888, he duly became a full naturalized citizen of the United States.

2d. That on or about said May 26, 1883, the plaintiff did in good faith, and with the *bona fide* intention of acquiring title thereto, make settlement upon the following lands within St. Louis county,

54 Minnesota, to wit: The northwest quarter (N. W. ¼) of section number three (3), in township sixty-one (61), north of range number fifteen (15), west of the fourth P. M.

3d. That on the aforesaid date the plaintiff did in good faith, and with the *bona fide* intention to acquire title to the aforesaid land, establish his residence upon and he has ever since continued to be and remain in the actual, exclusive and notorious possession thereof, during all of which time he has cultivated and improved the same and maintained his home upon said premises.

4th. That said lands were at all times located within the district whereof the United States local land office was in the city of Duluth, Minnesota, and at the time when the plaintiff commenced his residence upon said land, the plat of the township in which the same was located had not been filed in said local land office, by reason of which the plaintiff was unable to file on said lands.

5th. That subsequent to said settlement the said plat of the survey of said township was filed in said local land office, and thereupon and subsequent thereto, to wit, on July 2d, 1883, the plaintiff went to said land office with the intention of entering the said land as a homestead under the laws of the United States, and he did then and there request the officers in said land office that he be allowed to make such entry; that said land officers did then and there inform him that a mistake had been made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests against said survey on file in the said office, which protests were sufficient to raise the question
55 as to the accuracy of the same; that it was unnecessary for plaintiff to protest or object to said survey, or to file on said land, and they thereupon advised him to wait until the said protests which were there on file should be determined.

6th. That plaintiff was a foreigner by birth and at said time did not understand the English language, and was not familiar nor acquainted with any of the laws, rules and regulations relating to the disposition of the public lands, but relied upon the representations so made by said officers, and acted upon the advice so given him, and returned to continue his occupancy and improvement of said lands.

7th. That on the 5th day of August, 1884, the plaintiff discovered that said lands were claimed by the State of Minnesota as swamp lands, and thereupon on said date he duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making such entry. That at said time no adverse claim, other than the pretended claim of the State of Minnesota to said lands as swamp lands, had arisen or was made in reference thereto or filed in said land office.

8th. That the said local land officers rejected plaintiff's said application to enter said lands, on the ground that the same inured to the State of Minnesota under the act of March 12th, 1860, and

that his application to enter said lands was not made within three months after the filing of the township plat in said office.

9th. That on the 6th day of August, 1884, the plaintiff
56 duly filed in said local land office his affidavits of contest against said claim of the State of Minnesota to said land, duly corroborated by two witnesses, setting forth that said land was not swamp or overflowed land and unfit for cultivation, but that the same was all, with the exception of four or five acres in the northwest quarter (N. W. $\frac{1}{4}$) thereof, high, dry and fit for cultivation.

10th. That founded on said affidavits corroborated as aforesaid, on the 26th day of August, 1884, the plaintiff duly appealed from the rejection of his said application to enter said lands as a homestead by the said local land officers unto the Commissioner of the General Land Office. That said appeal with said affidavits was by said local land officers, on the 26th day of August, 1884, duly transmitted to the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884.

11th. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said lands as a homestead, and his said contest against the claim of the State of Minnesota to said lands as swamp lands, were pending and undetermined in the General Land Office, the said lands were, through mistake and inadvertence, patented to the State of Minnesota.

12th. That when the plaintiff commenced his residence on said lands, he erected thereon a good and substantial dwelling-house, and continued to reside therein until the summer of 1886, when
57 the same was destroyed by fire. That he immediately thereafter erected and constructed another dwelling-house on said lands, in which ever since said time he has continued to reside and now resides.

13th. That the plaintiff the first year he was on said land cleared and cultivated to crop about an acre and a half of said lands. That the next two succeeding years he cleared and cultivated, about four acres more of said land, and that each year since said time he has cultivated to crop all the land cleared by him as aforesaid.

14th. That said lands were not at the time of the passage of the act of March 12th, 1860, nor were they ever, nor are they now, swamp, wet, or overflowed, or unfit for cultivation; but on the contrary the same were, during all of said time, and now are, with the exception of four or five acres in the northwest corner thereof, high, dry and fit for cultivation.

15th. That on the 2d day of March, 1889, the State of Minnesota, by a deed of conveyance bearing date on that day, conveyed unto the St. Paul & Duluth Railroad Company the south one-half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

16th. That on the 21st day of March, 1889, the said St. Paul & Duluth Railroad Company by warranty deed, conveyed unto John Megins the said south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

17th. That on the 23d of March, 1889, the said John Megins by special warranty deed, conveyed unto Moses D. Kenyon an undivided one-half ($\frac{1}{2}$) of said south half (S. $\frac{1}{2}$) of the northwest (N. W. $\frac{1}{4}$) of said section three (3).

58 18th. That on the 25th day of March, 1891, the said Moses D. Kenyon and Ida H. Kenyon, his wife, by special warranty deed, conveyed unto defendant John Megins an undivided one-quarter ($\frac{1}{4}$) of the south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

19th. That on the 5th day of January, 1891, the State of Minnesota, by deed of conveyance of that date, conveyed unto the Duluth & Iron Range Railroad Company the north one-half of the northwest quarter (N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$) of said section three (3).

20th. That each and all of said defendants, when they respectively took the conveyance of said lands as aforesaid, did so with notice of the plaintiff's right, claim and interest in and to said lands.

As conclusions of law I find:

1st. That the plaintiff by his settlement, residence and improvements upon said lands, and his said application to enter the same as a homestead, and his appeal from the rejection thereof, and his said contest of the claim of the State of Minnesota thereto, acquired a right to be preferred in the acquisition of said lands from the United States, and that he is the equitable owner of said lands, to wit, the northwest quarter (N. W. $\frac{1}{4}$) of section number three (3), in township sixty-one (61) north of range number fifteen (15) west of the fourth P. M.; and

2d. That judgment should be entered establishing and decreeing him to be the equitable owner of all of said lands, and that
59 the defendants and all persons claiming by, through or under them, or *or* either of them, be forever barred and precluded from having or claiming any right, title, lien or interest in or to the said lands or any part thereof adverse to the plaintiff; and

3d. That plaintiff have judgment against defendants for his costs and disbursements herein.

Let judgment be entered accordingly.

By the court:

J. D. ENSIGN,
District Judge.

Dated Sept. 4, 1896.

Filed in my office at — o'clock — m., Sept. 4, 1896.

JOHN OWENS,
Clerk of District Court,
By W. J. WEST, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and }
Moses D. Kenyon, Defendants. }

Judgment-roll.

The above-entitled action having been duly entered upon the calendar of said court for the regular May A. D. 1895 term thereof, and having been duly and regularly reached in its order, and coming on for trial, the plaintiff appearing by his attorneys, Jno. Jenswold, Jr., and John Brennan, and the defendant The Duluth & Iron Range Railroad Company by its attorneys, Draper, Davis & Hollister, and the defendants Megins and Kenyon by their attorney, W. B. Phelps, and the said parties having submitted the evidence in support of their respective claims, and the cause having been duly argued and finally submitted by the above-named parties, and the court being fully advised in the premises, and having made and filed herein its findings of facts and conclusions of law, and order for judgment and decree herein :

Now, pursuant to the said findings and order for judgment and decree, and on motion of Jno. Jenswold, Jr., attorney for the plaintiff, it is hereby

Ordered, adjudged and decreed, that the plaintiff, Joseph Roy, is the equitable owner of the lands in controversy, to wit: the north-west quarter (N. W. 4) of section No. three (3), in township No. sixty-one (61), north of range No. fifteen (15), west of the fourth P. M.; and the defendants, The Duluth & Iron Range Railroad Company, John Megins and Moses D. Kenyon, and all persons claiming by, through, or under them, or either of them, be and they are hereby forever barred and precluded from having or claiming any right, title, lien or interest in or to the said lands, or any part thereof, adverse to the plaintiff and parties claiming under him.

It is further ordered and adjudged, that the plaintiff have and recover judgment against the above-named defendants for his costs and disbursements herein, which are taxed at the sum of \$82.39.

Witness the Honorable J. D. Ensign, one of the judges of the district court aforesaid, at Duluth, Minnesota, this 25th day of September, A. D. 1896.

[SEAL.]

JOHN OWENS, Clerk,
By J. S. MOODY, Deputy.

Filed in my office at — o'clock — m., September 25, 1896.

[SEAL.]

JOHN OWENS,
Clerk of District Court,
By J. S. MOODY, Deputy.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and }
Moses D. Kenyon, Defendants. }

To John Jenswold, Jr., attorney for the above-named plaintiff, and to W. B. Phelps, attorney for the above-named defendants, John Megins and Moses D. Kenyon, and to John Owens, clerk of said district court :

Please take notice that the above-named defendant Duluth & Iron Range Railroad Company appeals to the supreme court of the State of Minnesota, from judgment of the said district court entered herein on the 25th day of September, A. D. 1896, and from the whole thereof.

Dated this 2d day of March, A. D. 1897.

DRAPER, DAVIS & HOLLISTER,

*Attorneys for the Defendant Duluth & Iron Range
Railroad Company.*

62 Due service of the within notice of appeal, by copy, is hereby admitted at Duluth, Minn., this 3d day of March, 1897.

JNO. JENSWOLD, Jr.,
Attorney for Plaintiff.

WM. B. PHELPS,

Attorney for Defendants John Megins and Moses D. Kenyon.

JOHN OWENS,

Clerk of the District Court of St. Louis County, Minn.,

By W. J. WEST, *Deputy.*

Filed in my office at — o'clock — m., March 6th, 1897.

JOHN OWENS,

Clerk of District Court,

By W. A. KENNEDY, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, }
and Moses D. Kenyon, Defendants. }

Whereas the Duluth & Iron Range Railroad Company, one of the defendants in the above-entitled action, appeals to the supreme court of the State of Minnesota from the judgment made and entered herein on the 25th day of September, 1896 :

Now, therefore, we, B. P. Crane and J. L. Greatsinger, both
 63 residing at Duluth, St. Louis Co., Minn., do undertake, promise and agree to and with said Joseph Roy, plaintiff, that said Duluth & Iron Range Railroad Company shall pay all costs and charges that may be awarded against it on such appeal. Conditioned, however, that our liability hereunder shall not exceed the sum of two hundred fifty dollars.

Dated this second day of March, 1897.

B. P. CRANE. [SEAL.]
 J. L. GREATSINGER. [SEAL.]

Signed, sealed and delivered in presence of—

J. H. GRUBER.

H. J. GRANNIS.

STATE OF MINNESOTA,)
 County of St. Louis,) ss :

Be it known, that on this 2d day of March, A. D. 1897, before me, a notary public within and for said county, personally appeared B. P. Crane and J. L. Greatsinger, to me known to be the same persons described in and who executed the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] H. J. GRANNIS,
 Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA,)
 County of St. Louis,) ss :

B. P. Crane and J. L. Greatsinger, the persons named in and who executed the foregoing undertaking, being first duly sworn, doth, each for himself, depose and say, that he is a resident and freeholder
 64 of the State of Minnesota, and worth the amount of five hundred dollars above his debts and liabilities, and exclusive of his property exempt from execution.

B. P. CRANE.
 J. L. GREATSINGER.

Subscribed and sworn to before me, this 2d day of March, 1897.

[NOTARIAL SEAL.] H. J. GRANNIS,
 Notary Public, St. Louis Co., Minn.

Due service of the within undertaking by copy is hereby admitted, at Duluth, Minn., this 3d day of March, 1897.

JNO. JENSWOLD, JR.,
 Attorney for Plaintiff.

WM. B. PHELPS,
 Attorney for Defendants John Megins and Moses D. Kenyon.

The within undertaking and the sureties therein are hereby approved this 3d day of March, 1897.

J. D. ENSIGN,
 District Judge.

Filed in my office at — o'clock, — m., March 6, 1897.

JOHN OWENS,

Clerk of District Court,

By W. A. KENNEDY, *Deputy.*

65 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

You will please take notice: That the above-named defendants, John Megins and Moses D. Kenyon, appeal to the supreme court of the State of Minnesota from the judgment of this court in this action entered on the 25th day of September, 1896, and from the whole thereof.

Dated March 20, 1897.

WM. B. PHELPS,

Attorney for Defendants Megins and Kenyon.

To John Jenswold, Jr., attorney for plaintiff, and John Owens, Esq., clerk of the district court aforesaid.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

Whereas, the above-named defendants, John Megins and Moses D. Kenyon, have appealed to the supreme court of the State of Minnesota from the judgment of the district court aforesaid, duly
66 entered on the 25th day of September, 1896, in favor of plaintiff and against the defendants :

Now, therefore, we Kenneth Clark and G. H. Prince, residents of the city of St. Paul, county of Ramsey and State of Minnesota, do undertake, promise and agree with said respondent (the plaintiff aforesaid) that the appellants, John Megins and Moses D. Kenyon shall and will pay all costs and charges which may be awarded against them on said appeal, not exceeding the sum of two hundred and fifty dollars.

Dated this 20th day of March, 1897.

KENNETH CLARK.

G. H. PRINCE.

[SEAL.]
[SEAL.]

Signed, sealed and delivered in presence of—

J. C. NETHAWAY.

W. N. SCHOFF.

STATE OF MINNESOTA, }
County of Ramsey, } ^{ss} :

On this 22d day of March A. D. 1897, before me personally appeared Kenneth Clark and G. H. Prince, to me known to be the same persons described in and who executed the foregoing undertaking, and each for himself acknowledged the same to be his free act and deed.

[NOTARIAL SEAL.] W. N. SCHOFF,
Notary Public, Ramsey County, Minn.

67 STATE OF MINNESOTA, }
County of Ramsey, } ^{ss} :

Kenneth Clark and G. H. Prince the persons named in and who signed the foregoing undertaking, being first duly sworn, doth each for himself depose and say, that he is a resident and freeholder of of the State of Minnesota and worth the sum of five hundred dollars above his debts and liabilities, and exclusive of his property exempt from execution.

KENNETH CLARK.
G. H. PRINCE.

Subscribed and sworn to before me this 22d day of March, 1897.

[NOTARIAL SEAL.] W. N. SCHOFF,
Notary Public, Ramsey County, Minn.

Due service of the within notice of appeal and undertaking on appeal, as approved by the court by copy, is hereby admitted at Duluth, Minn., this 23d day of March, 1897.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

JOHN OWENS,
Clerk of District Court,

By W. J. WEST, *Deputy.*

The within undertaking and the sureties therein are hereby approved this 23d day of March, 1897.

J. D. ENSIGN,
District Judge.

Filed in my office at — o'clock — m. March 23, 1897.

JOHN OWENS,
Clerk of District Court,
By W. J. WEST, *Deputy.*

68 *Clerk's Certificate.*

STATE OF MINNESOTA, }
County of St. Louis, } ^{ss} :

District Court, Eleventh Judicial District.

I, John Owens, clerk of the district court, St Louis county, and State of Minnesota, do hereby certify, that I have compared the

foregoing papers-writing with the original summons, with sheriff's returns, complaint, answer of D. & I. R. R. Co., answer of John Megins, reply to answer of D. & I. R. R. Co., reply to answer of John Megins, notice and amended reply, notice and amended reply, demurrer to amended reply, order overruling demurrer, notice of filing order, motion and affidavit to make Moses D. Kenyon party defendant, order and affidavit of service, answer of M. D. Kenyon, stipulation as to reply to answer of M. D. Kenyon, findings of fact and conclusions of law, judgment, notice of appeal, undertaking on appeal and notice of appeal and undertaking on appeal, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original papers and the whole thereof.

Witness my hand and seal of said court, at Duluth, this 5th day of April, A. D. 1897.

[SEAL.]

JOHN OWENS,
Clerk of District Court,
By H. C. WEDMARK,
Deputy Clerk.

69

EXHIBIT "C."

10642-10643.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1897.

JOSEPH ROY, Respondent,	}	Nos. 62 & 81.
<i>vs.</i>		
DULUTH & IRON RANGE R. R. Co., Appellant.		

JOSEPH ROY, Respondent,	}
<i>vs.</i>	
DULUTH & IRON RANGE R. R. Co., Defendants;	}
John Megins <i>et al.</i> , Appellants.	

Syllabus.

The plaintiff, a qualified homesteader, settled upon a quarter section of the public lands as a homesteader, and duly made application to enter the same, tendering the fees therefor.

There was no adverse claim to the land except a pretended claim of the State that it was swamp land, but in fact it never was such. His application was refused by the local land office on the ground that the land inured to the State under the act of March 12th, 1860, and he appealed from such decision and duly instituted a contest with the State. While his appeal and contest were pending and undetermined in the Land Department, a patent for the land was by mistake and inadvertence issued to the State, and thereafter the State conveyed the land to the defendants, who then had notice of the rights of the plaintiff thereto. He has resided on the land as his home ever since his entry, and has performed or tendered per-

formance of all acts necessary under the homestead laws to complete his title; held, that he is, as against the defendants, the equitable owner of the land and entitled to judgment barring them from asserting any title to the land adverse to him. Judgment affirmed.

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10642-10643.

STATE OF MINNESOTA:

Supreme Court, Oct. Term, A. D. 1897.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE R. R. Co., Appellant. } Nos. 62 & 81.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE R. R. Co., Defendants; }
John Megins *et al.*, Appellants.*Opinion.*

Action to determine adverse claim to real estate. Judgment for the plaintiff, from which defendant-appealed.

The unquestioned facts of this case, as found by the trial court, are these: The plaintiff, a qualified homesteader under the laws of the United States relating to homesteads, in good faith and with the *bona fide* intention of acquiring title thereto under such laws, settled and established his residence on the quarter section of land described in the complaint herein. He has ever since maintained a dwelling-house thereon, improved and cultivated the land, and been in actual and exclusive possession thereof. At the time he so entered and settled upon the land a plat of the survey of the township in which it was situated had not been filed in the local land office at the city of Duluth, the office for the land district within which the land in question is situated. On July 2nd, 1883, and after the filing of such plat, the plaintiff went to the proper local land office for the purpose of entering the land as a homestead pursuant to his settlement thereon, and requested the proper officers to make such entry; whereupon they informed him that a mistake had been made in the survey and

71 protests had been filed against it, and that it was unnecessary for him to then file on the land, and advised him not to do so until the protests were determined. The plaintiff, being ignorant of the laws, rules, and regulations relating to the disposition of the public lands, relied upon such representations and acted upon such advice, and returned to his home and continued to occupy and improve the land without then filing upon it. The land never was swamp, wet, overflowed, or unfit for cultivation, but the whole thereof was at the time of the passage of the swamp land grant act of March 12th, 1860, high, dry, and fit for cultivation, except four

or five acres thereof. On August 5th, 1884, the plaintiff learned that his land was claimed by the State of Minnesota as swamp land, and thereupon and on the same day he duly made application to enter the same as a homestead and tendered the fee for making such entry to the proper local land officers. There was then no adverse claim to the land, except the pretended claim of the State to it as swamp land. The land officers refused plaintiff's application to enter the land, on the ground that it inured to the State under the act of March 12th, 1860, and his application was not made within three months after the filing of the township plat in the local land office. On the next day the plaintiff duly filed in such land office his affidavit of contest against the claim of the State, duly corroborated by two witnesses, to the effect that the land was not swamp or overflowed land and unfit for cultivation, but that the whole thereof was high, dry, and fit for cultivation, except four or five acres thereof. On Aug. 26th, 1884, he appealed to the Commissioner of the General Land Office from the rejection of the local land officers of his application to so enter the land; which appeal with the affidavits were on the same day transmitted
 72 by the local officers to such Commissioner and were duly filed by him on September 1st, 1884.

On January 23rd, 1885, while the plaintiff's appeal from the rejection of his application to enter the lands as a homestead and his contest with the State as to its claim that the land was swamp land were pending and undetermined in the General Land Office, the land was through mistake and inadvertence patented to the State. The State by its deeds dated March 2nd, 1889, and January 5th, 1891, respectively, conveyed the land to the defendant Duluth and Iron Range Railroad Co., which by warranty deed thereafter conveyed to the defendant Megins the south half of the quarter section, who conveyed an undivided half of the same to the defendant Kenyon. Each and all of the defendants when they respectively took their conveyances of the land did so with notice of plaintiff's right, claim, and interest therein.

As a conclusion of law the trial court directed judgment for the plaintiff, establishing and decreeing him to be the equitable owner of the whole quarter section, and that the defendants and all persons claiming by or under them or either of them be forever barred from having or claiming any right to the land adverse to the plaintiff.

Do the facts found justify this legal conclusion? This general question is the only one which the record presents for our consideration. The defendants claim that it must be answered in the negative. In support of the claim they urge:

1. That the plaintiff, by settling on the land as a homestead and offering to file thereon and the other proceedings taken and acts done by him as disclosed by the findings, did not acquire any equitable interest in the land, nor place himself in a position to attack the title of the State and its grantees; that he has not entered the land nor paid for it, and that there was no privity between him and the United States when the latter patented the land
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to the State, but he was a stranger to the title; hence his only remedy is by an action by the United States to cancel the patent, and when that is done prosecute his appeal in the Land Department. It is unnecessary to refer to or review the authorities cited by the defendants in support of this claim, for the Supreme Court of the United States has decided this precise question against them.

Shipley *vs.* Cowan, 91 U. S., 330.

Morrison *vs.* Starlmaker, 104 U. S., 213.

Ard *vs.* Brandon, 156 U. S., 537.

The last case cited was an action of ejectment for the recovery of a certain 80 acres of land which had been patented in 1873 by the U. S. to the Missouri, Kansas & Texas R'y Co., and the latter conveyed it to the plaintiff. The defendant's claim to the land was in effect that he settled on it June, 1866, as a homestead, and in July of the same year made application to the proper local land office to enter the land as a homestead and tendered the fees therefor. This was refused on the ground that the land was within the limits of the railway grant, although at that time the land had not been withdrawn from settlement. This was afterwards done and the land conveyed to the railway company. The defendant continued in possession of the land, cultivating and occupying it as his homestead. The district court of Kansas, where the action originated, gave judgment for the plaintiff, which was affirmed by the supreme court of the State. On writ of error the Supreme Court of the United States reversed the judgment. That court, approving and

74 following Shipley *vs.* Cowan, *supra*, held in effect that the defendant, having done all in his power to secure the land as his homestead and complied or tendered compliance with all the provisions of the homestead law necessary to complete his title to the land, and having failed to acquire the legal title through no fault of his own, but through the wrongful action of the land officers, he had a prior equitable claim to the land superior to the claims of the railway Co. or its grantees, which he might assert against them, although they held the patent title. Now, in the case at bar, if, as the trial court found, this land was not swamp land, it was subject to entry and settlement under the homestead laws of the United States; and if, as the court also found, a patent of the land was issued to the State by the mistake and inadvertence of the Land Department, it follows from the other facts found that the plaintiff, whatever his rights against the United States may or may not have been, is the equitable owner of the land as against the State and its grantees, who hold the naked legal title acquired by reason of such mistake without notice of his equities.

According to the findings of fact in this case, the plaintiff did everything in his power to perfect his title. He in good faith performed or tendered performance of all acts which under the homestead laws were essential to complete his right to the land, and he was only prevented from securing the legal title thereto by the wrong, mistake, and inadvertence of the land officers. Such being the case, it falls within the familiar rule that where a party acquires

with notice the legal title to real estate which of right belongs to another, he holds the title in trust for the rightful or equitable owner, and a court of equity will enforce the trust according to the right of each particular case.

2. The defendants further urge that the Land Department when it issued the patent to the State decided as a question of fact that the land was swamp land, and that this decision cannot be reviewed by this court except on the ground of fraud, error of law, or mistake of fact, and that the finding in this court that the patent was issued through mistake and inadvertence is not sufficient to take the case out of the general rule.

It cannot be doubted that in the administration of the public land system of the U. S. questions of fact, such as whether a certain tract is or is not swamp land, are for the consideration of the Land Department, and its decision thereon final, except in cases of fraud, mistake of fact, or error of law. In cases falling within the exception, its decisions may be reviewed by the courts.

It is contended by the defendants that the finding in this case that the patent was issued by mistake and inadvertence is not sufficient to "warrant the court in setting aside the patent," for there is no finding to the effect that there was any mistake or fraud on the part of the Land Department in finding that the land was not swamp land and not subject to private entry. The trouble with this contention is that there is nothing in the findings of the trial court for it to rest upon. There was no finding, direct or indirect, that the Land Department ever passed, mistakenly or otherwise, upon the question whether the land was swamp or not; on the contrary, the necessary inference from the facts found is that the question never was passed upon by it, and that by mistake and inadvertence it issued the patent without passing upon the question. The clerical act of issuing the patent by inadvertence cannot be regarded as a decision within the rule as to the review by the courts of the decisions of the Land Department. The patent having been issued by mistake, the act was not a decision, but an error. Even if the patent

76 had been deliberately issued while the plaintiff's contest and appeal were pending and undetermined, it would have been either a fraud or an error of law which the courts could review. It does not appear from the findings that when the plaintiff made his first application the State had made any claim to it; but it is expressly found that when he made the second application there was no adverse claim to the land except the pretended claim of the State that the land was swamp land, and that, in fact, the land was all high, dry, and fit for cultivation, except three or four acres, and that when the patent was issued by inadvertence the validity of the claim of the State and the rightfulness of the rejection of his application were pending and undetermined. The findings, taken as a whole, show that the patent was issued through an error of law, mistake and inadvertence on the part of the department, and fully sustain the judgment.

Judgment affirmed.

START, C. J.

[Endorsed:] In supreme ct. Joseph Roy *vs.* Duluth & Iron Range Railroad Co. *et al.* Opinion in sup. ct. of Minnesota. Endorsed: Filed Nov. 5, 1897. D. F. Reese, clerk.

77 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1897.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, Appellant.

} No. 62.

Pursuant to an order of court duly made and entered in this cause on the twenty-third day of November, A. D. 1897, it is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said Duluth & Iron Range Railroad Company, appellant herein, the sum and amount of forty-one and $\frac{2}{100}$ dollars (\$41.25), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 23rd day of November, 1897.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest:

D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute.....	\$25.00
Clerk's fees for making return.....	
Printer's fees.....	6.00
Clerk's fees, supreme court.....	10.00
Filing mandate.....	
Affidavits and acknowledgments.....	.25
Postage.....	
Copying returns for printer.....	
	<hr/>
	\$41.25

[Endorsed:] 10642. State of Minnesota, supreme court. Transcript of judgment. Filed November 23, A. D. 1897. D. F. Reese, clerk. — — —, attorney for —. Page No. —, — book.

STATE OF MINNESOTA, }
Supreme Court, } ss:

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within

copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 23rd day of November, A. D. 1897.

D. F. REESE, *Clerk*.

78 STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1897.

JOSEPH ROY, Respondent,	}	No. 62. Appeal from District Court, Eleventh Judicial District, County of St. Louis.
<i>VS.</i>		
DULUTH & IRON RANGE RAILROAD Company, Appellant.		

This ~~cause~~ having been duly argued and submitted at the general October term of this court, A. D. 1897, upon the return to the appeal herein :

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appeal from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered November 23rd, A. D. 1897.

[Seal of the Supreme Court, State of Minnesota.]

BY THE COURT.

Attest: D. F. REESE, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk*.

[Endorsed:] No. 10642. State of Minnesota, supreme court. Copy of order for judgment. Filed November 23, A. D. 1897. D. F. Reese, clerk. Entered on page —.

79 STATE OF MINNESOTA :

Supreme Court, General October Term, A. D. 1897.

TUESDAY MORNING, 9.30 O'CLOCK, *October 26th, A. D. 1897.*

Court convened pursuant to adjournment, all the justices being present.

JOSEPH ROY, Respondent,	}	Cal. No. 62. Reg. No. 10642.
<i>VS.</i>		
DULUTH & IRON RANGE RAILROAD Company, Appellant.		

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest :

D. F. REESE, *Clerk*.

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest:

D. F. REESE, *Clerk*.

[Endorsed:] 10642. State of Minnesota, supreme court. Copy of minutes of argument. Filed November 23, A. D. 1897. D. F. Reese, clerk.

80 [Endorsed:] No. 10643. State of Minnesota, supreme court. Joseph Roy, respondent, against Duluth & Iron Range Railroad Company, appellant. Judgment roll. Filed November 23rd, 1897. D. F. Reese, clerk.

81 STATE OF MINNESOTA:

Supreme Court.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS,
and Moses D. Kenyon, Appellants.

STATE OF MINNESOTA,)
County of St. Louis,) ss:

W. J. Bates, being first duly sworn, says: I reside in the said county of St. Louis and State of Minnesota. I have been on and am personally acquainted with the land comprising the northwest quarter of section three (3), township sixty one (61) north, range fifteen (15) west, of the fourth principal meridian, being situated in said county and State, and I know the value thereof. The value of said lands does not exceed the sum of twenty-five hundred dollars (\$2,500.00); said land is vacant and unoccupied, except that there is a small one-story frame shanty, the value of which shanty is less than fifty dollars (\$50.00); said land and every part thereof is wholly unfenced. The timber on the whole of said land is of the value of less than five hundred dollars (\$500.00).

I have had ten years' experience as a land explorer and timber estimator in said county of St. Louis.

W. J. BATES.

Subscribed and sworn to before me this 2nd day of December, A. D. 1897.

[Notarial Seal, St. Louis Co., Minn.]

THOS. J. DAVIS,

Notary Public, St. Louis Co., Minn.

82 [Endorsed:] 10643. Original. State of Minnesota, supreme court. Joseph Roy, respondent, *vs.* The Duluth & Iron Range Railroad Company, John Megins, and Moses D. Kenyon, appellants. Affidavit. Draper, Davis & Hollister, 400-406 First Nat'l Bank building, Duluth, Minn., attorneys for appellant Duluth & Iron Range Railroad Company. Filed Dec. 15, 1897. D. F. Reese, clerk.

83 Supreme Court of the United States.

DULUTH & IRON RANGE RAILROAD COMPANY, Plaintiff in Error, }
 vs. }
 JOSEPH ROY, Defendant in Error.

Assignments of Error.

Now comes said plaintiff in error, on this 4th day of December, 1897, and says that the order and judgment made in said cause affirming the judgment of the district court for the eleventh judicial district, State of Minnesota, is erroneous and against the just rights of plaintiff in error for the following reasons:

1. The facts found do not support the conclusions of law.
2. The court erred in finding, as a conclusion of law from the facts found, that the defendant in error is the equitable owner of the lands in question, to wit, the north half of the lands described in the complaint.
3. The court erred in finding, as a conclusion of law from the facts found, that defendant in error was entitled to judgment declaring him to be the equitable owner of said lands.
4. The court erred in affirming the judgment of the district court for the county of St. Louis for the reasons:

84 *a.* That the legal title to the lands in question, the north half of the land described in the complaint, was vested in plaintiff in error, and there was no finding by said district court that there was any mistake of law or fraud on the part of the General Land Office of the United States or any officer of the United States.

b. The finding by said district court that the patent to the State of Minnesota, through which plaintiff in error acquired legal title, was issued through a mistake and inadvertence does not constitute any ground for adjudging the defendant in error the equitable owner of the land and entitled to judgment.

c. That defendant in error is not the real party in interest and never had any legal or equitable interest in the land, the United States being the only party which could question or attack the action of the officers of the General Land Office of the United States in issuing the patent to the State of Minnesota or invoke the action of the courts in determining its validity or to set it aside.

Wherefore said plaintiff in error prays that said order and judgment of the supreme court of the State of Minnesota be reversed and said court be directed to enter a judgment in said cause reversing the judgment of the district court of the eleventh judicial district, St. Louis county, State of Minnesota, and dismissing the bill of complaint of said defendant in error.

JAMES K. REDINGTON,
 DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff in Error.

85 [Endorsed:] Original. Supreme Court of the United States. Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error. Assignments of error of plaintiff in error. Draper, Davis & Hollister, 400-406 First National Bank building, Duluth, Minnesota, attorneys for plaintiff in error.

86 STATE OF MINNESOTA :

In Supreme Court.

I, Darius F. Reese, clerk of the supreme court for the State of Minnesota, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the *following* pages, numbered from 1 to 86, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error, including plaintiff in error's assignments of error, prayer for reversal, citation to the adverse party, and the opinion of the court, delivered by Chief Justice Start, affirming the judgment of the district court for the eleventh judicial district, St. Louis county, Minnesota, in said cause, as the same remain of record and on file in this office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of St. Paul, in the State of Minnesota, this 16th day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[Seal of the Supreme Court, State of Minnesota.]

DARIUS F. REESE, *Clerk*.

[Endorsed:] Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error.

Endorsed on cover: Case No. 16,764. Minnesota, supreme court. Term No., 221. Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy. Filed December 28th, 1897.

In Case in the Supreme Court of the State of
Wisconsin

BRIEF FOR PLAINTIFF IN ERROR

J. M. WILSON

DAY & HOLLISTER and others
vs.
The People of the State of Wisconsin

WASHINGTON, D. C.,
GEO. BARN, PRINTER AND BINDER
1899

Supreme Court of the United States.

OCTOBER TERM, 1898.

DULUTH AND IRON RANGE RAIL-
ROAD COMPANY,

PLAINTIFF IN ERROR,

v.

JOSEPH ROY,

DEFENDANT IN ERROR.

No. 221.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The case at bar is a suit or action under the laws of the State of Minnesota, brought in the District Court, Eleventh Judicial District of said State, by Joseph Roy, the defendant in error here, against the plaintiff in error, the Duluth and Iron Range Railroad Company and John Megins, for the purpose of determining the adverse interests of said company and Megins, respectively, in and to certain real property described in the complaint, to wit,

the N.W. $\frac{1}{4}$ of section 3, township 61 N., range 15 W., the north half of said quarter section being claimed by said company and the south half thereof by said Megins, under mesne conveyances by the State of Minnesota, to which the premises had been patented by the United States. The plaintiff below, Roy, claimed the premises by virtue of an alleged settlement upon the same, and other acts done and performed in connection therewith under the homestead laws of the United States prior to said patent. During the progress of the suit in the trial court, Moses D. Kenyon, shown to have an undivided interest in the south half of said quarter section, was made a party defendant; trial, upon complaint, separate answers and replications under the practice of said State, was had before the judge of said district court without a jury; the said court filed its findings of facts and conclusions of law, and upon such findings and conclusions entered judgment for plaintiff; the defendants thereupon, respectively, appealed to the Supreme Court of the State of Minnesota; said last-mentioned court affirmed in all things the judgment below; thereupon the said Duluth and Iron Range Railroad Company, one of said defendants, sued out in this court its writ of error, and the case thus comes here for review.

The proceedings in the cause, in detail, as found in the transcript, were as follows:

1. Plaintiffs' complaint alleging ownership and possession of the premises; that defendants claimed an estate or interest therein adversely to plaintiff, and that suit is brought to determine such adverse claims. Demand is thereupon made that defendants set up their claim, and it is prayed that the court adjudge the plaintiff to be sole and absolute owner of said premises (Transcript, p. 6).

2. Answer of Duluth and Iron Range Railroad Company denying all averments not expressly admitted, and particularly that plaintiff is in possession of the premises, and alleging that said company is the owner in fee simple and entitled to possession of the land, and that plaintiff has no title to, interest in, or lien upon the same (page 7).

3. Answer of John Megins, alleging ownership in fee, and that the land was vacant and unoccupied at commencement of the suit (page 8).

4. Replies of plaintiff, being general denials of answers (pages 9, 10).

5. Amended replies of plaintiff, setting up in detail the facts upon which he relies to establish a valid right, claim or title under the homestead laws of the United States (pages 13 to 20).

6. Demurrer of defendant John Megins to new matter contained in amended reply (page 21).

7. Order overruling above demurrer (page 22).

8. Motion of plaintiff to make Moses D. Kenyon party defendant (pages 22 to 24).

9. Order making Moses D. Kenyon party defendant (page 25).

10. Answer of defendant Kenyon, alleging ownership in fee, and that the premises were vacant and unoccupied at commencement of suit (page 26).

11. Stipulation, plaintiff's amended replication to apply to last above answer (page 27).

12. Finding of facts and conclusions of law in trial court (pages 27 to 30).

13. Judgment-roll (page 31).

14. Appeal of Duluth and Iron Range Railroad Company (page 32).

15. Appeal of Megins and Kenyon (page 34).

16. Opinion, Start, C. J., Supreme Court, Minnesota, upon hearing of above appeals (pages 36 to 40).

17. Judgment, Supreme Court, in pursuance of above opinion (page 41).

18. Writ of error (page 2).

19. Assignments of error (page 43).

The finding of facts by the trial court were as follows (pages 27 to 30):

Finding of Facts.

"1st. That on or about the 26th day of May, A. D. 1883, the plaintiff was duly qualified to enter government lands under the homestead and pre-emption laws of the United States, and on the 9th day of June, 1888, he duly became a full naturalized citizen of the United States.

"2d. That on or about said May 26, 1883, the plaintiff did in good faith, and with the *bona fide* intention of acquiring title thereto, make settlement upon the following lands within St. Louis County, Minnesota, to wit: The northwest quarter (N. W. $\frac{1}{4}$) of section number three (3), in township sixty-one (61), north of range number fifteen (15), west of the fourth P. M.

"3d. That on the aforesaid date the plaintiff did, in good faith, and with the *bona fide* intention to acquire title to the aforesaid land, establish his residence upon and he has ever since continued to be and remain in the actual, exclusive and notorious possession thereof, during all of which time he has cultivated and improved the same and maintained his home upon said premises.

"4th. That said lands were at all times located within the district whereof the United States local land office was in the city of Duluth, Minnesota, and at the time when the plaintiff commenced his residence upon said land, the plat of the township in which the same was located had not been filed in said local land office, by reason of which the plaintiff was unable to file on said lands.

"5th. That subsequent to said settlement the said plat of the survey of said township was filed in said local land

office, and thereupon and subsequent thereto, to wit, on July 2d, 1883, the plaintiff went to said land office with the intention of entering the said land as a homestead under the laws of the United States, and he did then and there request the officers in said land office that he be allowed to make such entry; that said land officers did then and there inform him that a mistake had been made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests against said survey on file in the said office, which protests were sufficient to raise the question as to the accuracy of the same; that it was unnecessary for plaintiff to protest or object to said survey, or to file on said land, and they thereupon advised him to wait until the said protests which were there on file should be determined.

"6th. That plaintiff was a foreigner by birth and at said time did not understand the English language, and was not familiar nor acquainted with any of the laws, rules and regulations relating to the disposition of the public lands, but relied upon the representations so made by said officers, and acted upon the advice so given him, and returned to continue his occupancy and improvement of said lands.

"7th. That on the 5th day of August, 1884, the plaintiff discovered that said lands were claimed by the State of Minnesota as swamp lands, and thereupon on said date he duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making such entry. That at said time no adverse claim, other than the pretended claim of the State of Minnesota to said lands as swamp lands, had arisen or was made in reference thereto or filed in said land office.

"8th. That the said local land officers rejected plaintiff's said application to enter said lands, on the ground that the same inured to the State of Minnesota under the act of March 12th, 1860, and that his application to enter said lands was not made within three months after the filing of the township plat in said office.

"9th. That on the 6th day of August, 1884, the plain-

tiff duly filed in said local land office his affidavits of contest against said claim of the State of Minnesota to said land, duly corroborated by two witnesses, setting forth that said land was not swamp or overflowed land and unfit for cultivation, but that the same was all, with the exception of four or five acres in the northwest quarter (N.W. $\frac{1}{4}$) thereof, high, dry, and fit for cultivation.

"10th. That founded on said affidavits corroborated as aforesaid, on the 26th day of August, 1884, the plaintiff duly appealed from the rejection of his said application to enter said lands as a homestead by the said local land officers unto the Commissioner of the General Land Office. That said appeal with said affidavits was by said local land officers, on the 26th day of August, 1884, duly transmitted to the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884.

"11th. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said lands as a homestead, and his said contest against the claim of the State of Minnesota to said lands as swamp lands, were pending and undetermined in the General Land Office, the said lands were, through mistake and inadvertence, patented to the State of Minnesota.

"12th. That when the plaintiff commenced his residence on said lands, he erected thereon a good and substantial dwelling-house, and continued to reside therein until the summer of 1886, when the same was destroyed by fire. That he immediately thereafter erected and constructed another dwelling-house on said lands, in which ever since said time he has continued to reside and now resides.

"13th. That the plaintiff the first year he was on said land cleared and cultivated to crop about an acre and a half of said lands. That the next two succeeding years he cleared and cultivated, about four acres more of said land, and that each year since said time he has cultivated to crop all the land cleared by him as aforesaid.

"14th. That said lands were not at the time of the passage of the act of March 12th, 1860, nor were they

ever, nor are they now, swamp, wet, or overflowed, or unfit for cultivation; but on the contrary the same were, during all of said time, and now are, with the exception of four or five acres in the northwest corner thereof, high, dry, and fit for cultivation.

"15th. That on the 2d day of March, 1889, the State of Minnesota, by a deed of conveyance bearing date on that day, conveyed unto the St. Paul & Duluth Railroad Company the south one-half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

"16th. That on the 21st day of March, 1889, the said St. Paul & Duluth Railroad Company, by warranty deed, conveyed unto John Megins the said south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

"17th. That on the 23d of March, 1889, the said John Megins, by special warranty deed, conveyed unto Moses D. Kenyon an undivided one-half ($\frac{1}{2}$) of said south half (S. $\frac{1}{2}$) of the northwest quarter (N.W. $\frac{1}{4}$) of said section three (3).

"18th. That on the 25th day of March, 1891, the said Moses D. Kenyon and Ida H. Kenyon, his wife, by special warranty deed, conveyed unto defendant John Megins an undivided one-quarter ($\frac{1}{4}$) of the south half (S. $\frac{1}{2}$) of the northwest quarter (N.W. $\frac{1}{4}$) of said section three (3).

"19th. That on the 5th day of January, 1891, the State of Minnesota, by deed of conveyance of that date, conveyed unto the Duluth & Iron Range Railroad Company the north one-half of the northwest quarter (N. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$) of said section three (3).

"20th. That each and all of said defendants, when they respectively took the conveyance of said lands as afore-said, did so with notice of the plaintiff's right, claim and interest in and to said lands."

The assignments of error certified to this court, upon return to the writ of error, are as follows (page 44):

Assignments of Error.

"Now comes said plaintiff in error, on this 4th day of December, 1897, and says that the order and judgment

made in said cause affirming the judgment of the district court for the eleventh judicial district, State of Minnesota, is erroneous and against the just rights of plaintiff in error for the following reasons:

"1. The facts found do not support the conclusions of law.

"2. The court erred in finding, as a conclusion of law from the facts found, that the defendant in error is the equitable owner of the lands in question, to wit, the north half of the lands described in the complaint.

"3. The court erred in finding, as a conclusion of law from the facts found, that defendant in error was entitled to judgment declaring him to be the equitable owner of said lands.

"4. The court erred in affirming the judgment of the district court for the county of St. Louis for the reasons:

"*a.* That the legal title to the lands in question, the north half of the land described in the complaint, was vested in plaintiff in error, and there was no finding by said district court that there was any mistake of law or fraud on the part of the General Land Office of the United States or any officer of the United States.

"*b.* The finding by said district court that the patent to the State of Minnesota, through which plaintiff in error acquired legal title, was issued through a mistake and inadvertence does not constitute any ground for adjudging the defendant in error the equitable owner of the land and entitled to judgment.

"*c.* That defendant in error is not the real party in interest and never had any legal or equitable interest in the land, the United States being the only party which could question or attack the action of the officers of the General Land Office of the United States in issuing the patent to the State of Minnesota or invoke the action of the courts in determining its validity or to set it aside.'"

Upon the foregoing findings of facts and assignments of error, it is desired, on behalf of plaintiff in error, to submit the following propositions:

I. Equitable title necessary to sustain a suit like that

bar must be founded upon privity with the original legal title. It is almost universally based upon contract fully executed except the ministerial act of conveyance. The defendant in error, by his settlement and subsequent steps, as found, did not establish privity with the United States, the original owner of the legal title, or acquire any equitable interest in the land. He is not, therefore, in position to attack the legal title held by the plaintiff in error.

II. The legal title of the plaintiff in error had its origin in the patent of the United States to the State of Michigan. If the patent be taken as conveying lands enuring to the State under the swamp-land grant, then the patent itself inherently involves and conclusively presumes an adjudication by the Land Department of the fact that the premises are swamp in character. That finding of fact cannot be reviewed by the court in this proceeding. This being so, the legal title of plaintiff in error stands here unimpeached.

III. So far, however, as the findings are concerned, the patent may have been issued under any of the various acts of Congress granting lands to the State. In the absence of a specific finding that it was issued under the swamp-land act, the court will not conclude that the Land Department erred in its issue.

IV. The finding of the trial court that the patent to the State was issued "through mistake and inadvertence" cannot assist the defendant in error. If the mistake was one of fact, it is not here, in this proceeding, remediable. If mistake of law, it must appear wherein such mistake consists. Without such specific finding this court cannot determine whether error of law occurred. It will certainly not presume such an error from so general a finding.

V. If the finding of "mistake and inadvertence" be taken as relating to the fact that at the date of patent an appeal by defendant in error was pending in the Department and as meaning that such appeal was, by mistake, overlooked, this would not entitle the plaintiff below to maintain this suit, for upon consideration of such appeal, the decision might be the same.

I.

NO EQUITABLE TITLE TO SUSTAIN THE SUIT.

The plaintiff in error, defendant below, is the owner of the legal title by mesne conveyance from the United States, the original proprietor. January 23, 1885, the United States patented the premises to the State (11th Finding; Transcript, p. 29), and January 25, 1891 (19th Finding; Transcript, p. 30), the State conveyed the same to the plaintiff in error.

To defeat this legal title, the defendant in error, plaintiff below, relies upon what is supposed to be an equitable title founded upon certain requirements performed and proceedings thereon taken by him, by way of initiating a claim to the premises under the homestead laws of the United States. These acts and proceedings were as follows :

(1) *Requirements performed.* The steps taken by the claimant, in this connection, were : (a) Settlement upon the land, May 26, 1883 (2d Finding, Tr., p. 28) ; (b) residence thereon from date of such settlement to date of trial, and cultivation and improvement of the land during that period (3d Finding, Tr., p. 28) ; (c) erection, at date of settlement, of a substantial dwelling-house, which was burned and replaced by another in 1886 (12th Finding

Tr., p. 29); (d) cultivation of about five acres of the land (13th Finding, Tr., p. 29).

(2) *Proceedings taken.* The steps taken to assert the claim were as follows: (a) July 2, 1883, after the survey of the land, an informal application to make entry, not in writing and with no tender of fees, abandoned because of certain information given him by the local officers relative to supposed irregularity of the survey (5th Finding, Tr., p. 28); (b) August 5, 1884, formal application to make entry, with tender of fees, which application was rejected by the local officers on the ground, among others, that the premises inured to the State under the swamp-land grant (7th and 8th Findings, Tr., pp. 28, 29); (c) August 6, 1884, affidavits of contest against claim of State filed by claimant in the local office (9th Finding, Tr., p. 29); (d) August 26, 1884, an appeal by claimant to the Commissioner of the General Land Office from the decision of the local officers rejecting application to enter (10th Finding, Tr., p. 29).

It will be observed from the above that the defendant in error has, at no time, ever received from the United States any recognition whatever of his asserted claim; that so far as the United States is concerned, it has never done any act admitting the privity of the claimant, and that upon the contrary it has, so far as such claim was asserted, denied its validity by the rejection of the application to enter, and has, by patent, otherwise disposed of the land. It will further be observed that the defendant in error, to support his claim of equitable title, has shown nothing more than a mere compliance, without the assent of the United States, with certain of the conditions precedent to the allowance of a final homestead entry.

The Homestead laws of the United States require: (a) an original homestead entry, so called, to be allowed upon certain preliminary affidavits and proofs; (b) a settlement, residence upon and improvement of the claim for a certain period; (c) at the expiration of such period, proof, according to certain prescribed forms, of compliance with all the requirements of the statute. This ultimate showing is technically called "final proof," and upon such showing only, a final certificate, conferring a vested right to a patent, is issued.

Revised Statutes, secs. 2289, 2290, 2291.

Act of March 3, 1891, 26 Stat. 1095.

The provision as to final proof and entry is found in section 2291 of the Revised Statutes, unchanged in any way by the act of March 3, 1891, and is as follows:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in the case of her death, his heirs or devisee; or in the case of a widow making such entry, her heirs or devisee, in case of her death, proves by two creditable witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they, will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

The defendant in error has never made or offered to make the final proof required by this statute. Categori-

cally stated, he has never proved to the Land Department, or offered to prove, by two credible witnesses, or otherwise, that he had resided upon or cultivated the land for five years succeeding his original affidavit, nor has he ever made or offered to make, in the Land Department, or elsewhere, any affidavit that no part of the land had been alienated except as provided in section 2288 of the Revised Statutes. In other words, as shown by the record in the case at bar: (a) he has never proved or offered to prove in the Land Department the residence and cultivation required by law; (b) he has never made or offered to make, either in the Land Department or in the proceeding at bar, the affidavit of non-alienation also required by the statute; (c) he has not, even in the case at bar, shown that, as a matter of fact, he has not alienated the land in violation of the statute.

These questions (residence, cultivation, non-alienation) are all for the Land Department to decide; questions particularly submitted to its special jurisdiction by law, and in respect to which, as findings of fact, its decisions are conclusive even upon the court. Until these questions have been submitted to the Department by a claimant, or at least until he has offered to so submit them and been improperly refused recognition in that regard, such a claimant has certainly no legal or equitable right which he can set up as against the holder of the legal title issued in the meanwhile by the Government.

Suppose the patent to the State had never issued, and the defendant in error should now tender to the United States the final proof required. *Non constat*, that the same would be accepted as sufficient or that final entry would result. Indeed, that proof would, necessarily, upon the showing made in the case at bar, be rejected, for there is here an entire absence of all evidence of non-alienation.

There was but one way by which the defendant in error could have established a legal right, title, or claim to a patent, viz., by proving to the satisfaction of the Land Department, in the manner pointed out by the statute, that all the requirements of the law had been performed. This was not done. This being so, no equitable title entitled to recognition in this court could possibly arise except upon a showing that tender of proof of these requirements was made and consideration thereof denied by reason of the patent, or otherwise. This has not been done as to any of the requirements above particularly mentioned, and as to one, non-alienation, there is absolutely no proof, or even allegation, that alienation has not actually occurred.

The contention of the defendant in error thus resolves itself into the proposition that he is entitled to the judgment or decree of this court declaring him to be the sole and absolute owner of the premises in question, notwithstanding the fact that the United States has never, in any manner, recognized his claim, or that he held in any way in privity with it; the further fact that he has never proved to the United States, or offered to so prove, the ultimate facts upon which alone his claim could be recognized; and the still further fact that he has not proved or alleged all of such essential facts even in the case at bar. In other words, this court is asked to decree title, as against a patent, in one who has never established, or offered to establish, a valid claim before the Land Department and who does not, even in the case at bar, prove the facts which, if submitted to the Department, would show a valid claim.

We submit, with great confidence, that this contention is not well founded and that an equitable title cannot be thus established to overthrow the legal title evidenced by the patent.

The fact that the land was patented during the period when final proof could have been made on the homestead claim, does not relieve the defendant in error from the operation of the doctrine we above invoke. Before he can invoke the equitable remedy, he must bring himself technically into the position of legal privity in interest. He must, at the least, here establish such a state of fact as would entitle him to a patent, providing the patent to the State was out of the way. And this he has not done.

In a suit of this character, it was incumbent upon the defendant in error, the complainant below, to establish such a state of fact as would have justified the court in holding that *he himself* was entitled to a patent for the premises. It would not have been sufficient for him to have shown illegality or defect in the title of the patentee.

He was required to go further than that and establish a good claim or title in himself; otherwise he had no standing in court. To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received a patent. It must further appear that, by the law properly administered, the legal title should have been awarded to the complainant.

Bowhall *v.* Dilla, 114 U. S. 47, 50.

Sparks *v.* Pierce, 115 *ib.* 408, 412.

Lee *v.* Johnson, 116 *ib.* 48, 50

An equitable title, to sustain a suit like that at bar, must be founded upon some privity between the plaintiff and the original fee-simple owner. Such privity, if not necessarily the result of executed contract, certainly cannot arise without the assent and concurrence, express or implied, of the fee-simple owner. The defendant in error

has not, under the circumstances stated in the findings, established any such privity with the original source of title, and has, therefore, no standing as an equitable owner and is not entitled to maintain this suit.

Cooper v. Roberts, 18 How. 173.

Spencer v. Lapsley, 20 How. 264.

The Yosemite Valley Case, 15 Wall. 77.

Ehrhardt v. Hogaboom, 115 U. S. 67.

Cornelius v. Kessel, 128 U. S. 456.

Hartmann v. Warren, 76 Fed. Rep. 157.

To avoid this contention upon our part, counsel for defendant in error appear to rely almost entirely upon—
Ard v. Brandon, 156 U. S. 537.

This case, however, although in some respects similar to that at bar, is still clearly to be distinguished therefrom in several respects, and particularly and conclusively by the fact that Ard, the settler claiming against the conveyance of the United States, fully complied with all the requirements of law *by tendering the final proof required by the statute*, this fact being particularly set forth in the statement of the case (p. 540) as follows:

“In 1872 he made formal application to prove up on the land, but his application was denied by the local land officers. From this denial he prosecuted an appeal to the Commissioner of the General Land Office, and thence to the Secretary of the Interior, by both of whom the decision of the local land officers was affirmed.”

In the case then before the court the claimant not only fully established all the facts showing him to be entitled, but also that he had offered to prove all those facts to the Land Department and had been refused recognition.

In the case at bar no such proof or offer to the Department is shown. The distinction is obvious.

II.

THE PATENT, IF ISSUED UNDER THE SWAMP ACT, WAS AN
ADJUDICATION OF FACT.

The patent was issued to the State of Minnesota January 23, 1885 (11th Finding, Transcript, p. 29). The finding of fact relating to this matter does not determine whether said patent was issued for lands enuring to the State under the swamp-land grant or otherwise. Assuming, however, as will doubtless be claimed by our opponents, that the patent was so issued, and that it is to be so taken in the case at bar, we then submit that the issue of such patent by the Land Department is of itself an adjudication of the fact that the lands in question are swamp and overflowed, and that such finding of fact is not open to be reviewed by the courts in this proceeding. Whether said lands were swamp or not was a question of fact to be determined by the Land Department, and, assuming that the lands were patented to the State as swamp, the issue of said patent involved the determination by the proper officers of the Land Department that the lands were, as matter of fact, of the class which enured to the State under the grant of 1860. The decision of that question of fact was within the exclusive jurisdiction of the Land Department and cannot be impeached or reviewed by the court.

Johnson v. Towsley, 13 Wall. 72.

Warren v. Van Brunt, 19 Wall. 646.

Shepley v. Cowan, 91 U. S. 330.

French v. Fyan, 93 U. S. 169.

- Moore v. Robbins*, 96 U. S. 530.
Marquez v. Frisbie, 101 U. S. 473.
Vance v. Burbank, 101 U. S. 514.
Quinby v. Conlan, 104 U. S. 420.
Smelting Co. v. Kemp, 104 U. S. 636.
Steele v. Smelting Co., 106 U. S. 447.
Baldwin v. Stark, 107 U. S. 463.
United States v. Minor, 114 U. S. 233.
Ehrhardt v. Hogaboom, 115 U. S. 67.
Lee v. Johnson, 116 U. S. 48.
Wright v. Roseberry, 121 U. S. 488.
Cragin v. Powell, 128 U. S. 691.
Knight v. Land Assn., 142 U. S. 161.
United States v. Cal. & Ore. Land Co., 148 U. S. 31.
Barden v. N. P. R.R. Co., 154 U. S. 288.
Bishop of Nesqually v. Gibbon, 158 U. S. 155.
Atty. Genl. Miller, 19 Op. 684.

If, therefore, the patent is to be considered as one under the act of 1860, the fact that the land in controversy is swamp and overflowed, and, therefore, belongs to the State, is to be here taken as conclusively established. In this view of the case, the finding of the trial court (14th Finding ; Transcript, p. 29) that the land is not swamp or overflowed, is immaterial in the disposition of the case. If the lands were in fact swamp lands and were patented to the State as such, the patent was properly issued and defendant in error has no ground for complaint. If, on the other hand, the lands were not swamp, it was the province of the Land Department to so decide and is not the province of the court. In this connection it will be noted that there is no finding in the case that the lands were determined not to be swamp by the Land Department.

III.

UNDER THE FINDINGS, PATENT NOT NECESSARILY UNDER
SWAMP ACT.

As hereinbefore stated, the finding of the trial court in respect to the issue of the patent does not determine how or under what particular statute such patent was issued. So far as anything appears in this finding, the patent may have been issued under any other provision of law authorizing the patenting of land to the State of Minnesota. If the Land Department issued such patent under any authority other than the swamp-land act, the finding that the patent was made by mistake and inadvertence was clearly immaterial, so far as the rights of this respondent are concerned. If the lands were not swamp lands, and were patented to the State under some law other than the swamp act, the defendant in error cannot complain. And in the absence of a finding that the lands were patented to the State as swamp lands, the court will not conclude or presume that the Land Department committed an error in the issue of such patent.

IV.

THE FINDING OF MISTAKE AND INADVERTENCE TOO GENERAL.

The finding of fact relative to the issue of the patent declares that such patent was issued "through mistake and inadvertence." Whether the word "mistake" as here used, means mistake of fact, or mistake of law, does not appear. If it be a mistake of fact, this court cannot, as we have already seen, inquire into it and the finding becomes immaterial. If a mistake of law, the finding is

too general to be considered. The defendant in error, in his pleadings, does not claim any such mistake. If, however, such a position be taken upon the argument of the case, we then submit that in order to take advantage of a mistake of law, in the disposition of the land by the Land Department, it must be made to appear by the findings wherein such mistake consists and what statute is misconstrued or violated. In other words, the particular mistake must be pointed out and designated by the finding of the court, in order that it may appear whether what is claimed to be a mistake in the construction of law is really such.

Johnson *v.* Towsley, 13 Wall. 72.

Marquez *v.* Frisbie, 101 U. S. 473.

Quinby *v.* Conlan, 104 U. S. 420.

The use of the word "inadvertence" in this finding may possibly have reference to the further fact, stated in the 10th and 11th findings, that at the date of such patent the appeal of the defendant in error to the Commissioner of the General Land Office was pending and undetermined in said office. Such inadvertence, even if it be considered as established, does not assist the defendant in error. It would not in any way involve fraud nor, necessarily, any mistake of law, or even of fact. It would be simply clerical oversight on the part of the Department, and it would not follow that upon consideration of such appeal, the ultimate action of the Department would be in any wise different from what actually was done. *Non constat* the Department would not have decided, upon the appeal, that the land was swamp.

V.

IF APPEAL HAD BEEN CONSIDERED, RESULT MIGHT HAVE BEEN THE SAME.

If, while the appeal of the defendant in error was pending and undetermined in the Land Department, such appeal was overlooked by mistake and a patent was thus inadvertently issued, that fact does not entitle the plaintiff in error to the relief attempted to be given by the court below. No mistake either of law or fact was involved, and no fraud being charged, the mistake was a mere clerical oversight. The position of the defendant in error is that the Commissioner has not acted upon his appeal, and is deprived of jurisdiction to act by reason of the patent. Concede this position for the sake of the argument, and it does not then follow that if the Commissioner's jurisdiction to act were restored, the act of issuing the patent would be changed. The question as to the character of the land would still be one within the jurisdiction of the Commissioner, and it might be decided, upon the second hearing, precisely as it was necessarily decided upon by the issue of the patent. In other words, the claim here made in respect to mistake and inadvertence in the issue of the patent, even if conceded, does not entitle the defendant in error to the relief which he has obtained in the court below, namely, a judgment declaring him to be possessed of the sole and exclusive title to the premises in controversy.

VI.

Upon the foregoing considerations, it is respectfully submitted that the judgment of the Supreme Court of the

State of Minnesota should be reversed and the cause remanded with directions to enter judgment for the plaintiff in error, the Duluth and Iron Range Railroad Company.

Respectfully submitted.

J. M. WILSON,

Attorney for Plaintiff in Error.

DAVIS, HOLLISTER AND HICKS,

of Counsel.

N^o. 221.

Brief of IN THE *Vale for*
Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 26, 1899.

DULUTH AND IRON RANGE RAIL-
ROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

JOSEPH ROY,

DEFENDANT IN ERROR.

No. 221.

In Error to the Supreme Court of the State of
Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

J. M. VALE,

Attorney for Defendant in Error.

JOHN BRENNAN,

Of Counsel.

WASHINGTON, D. C. :

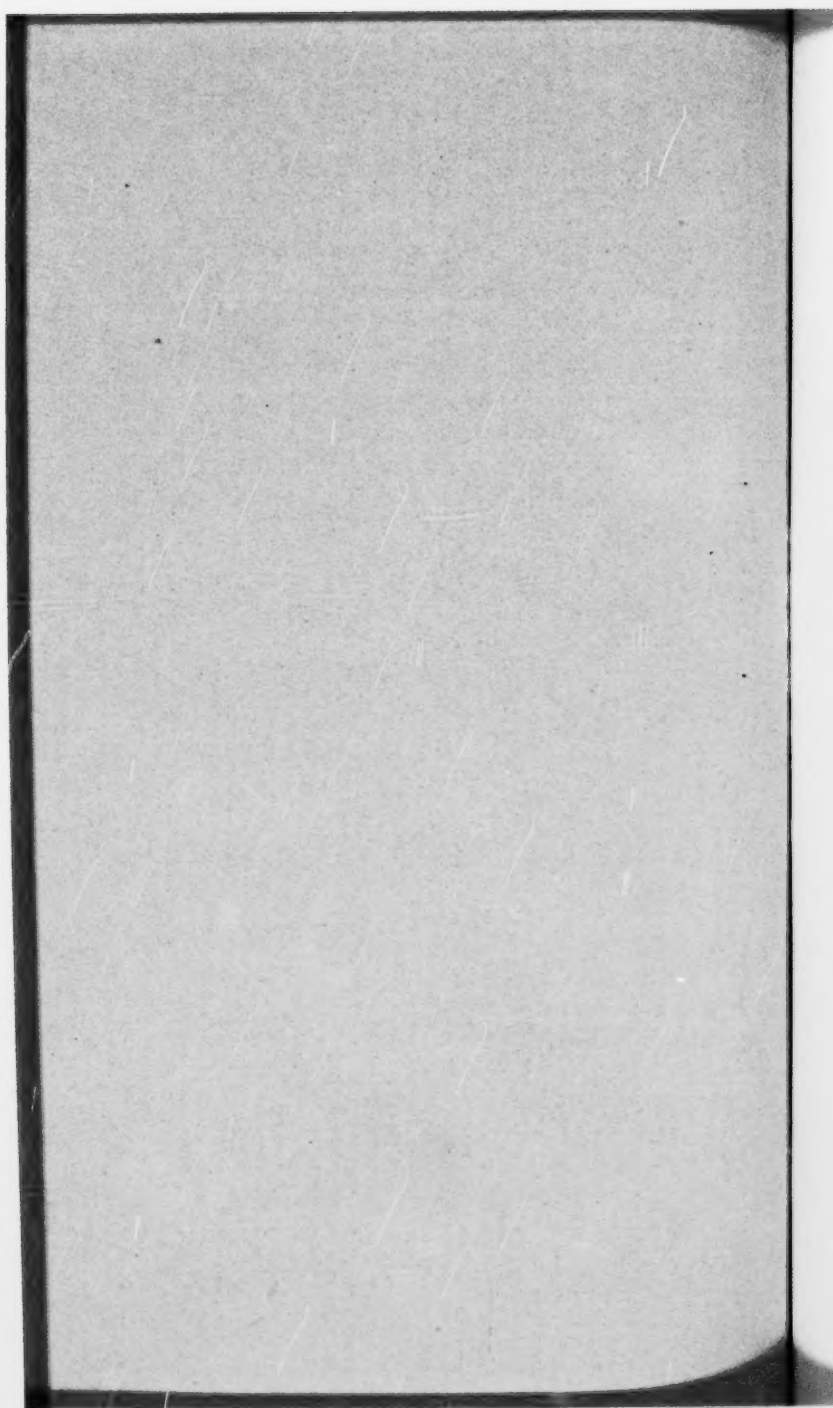
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JAMES M. McHENRY,
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IN THE

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DULUTH AND IRON RANGE RAIL-
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v.

JOSEPH ROY,
DEFENDANT IN ERROR.

No. 221.

Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

I.

Privity between the plaintiff and the United States sufficient to sustain this suit is found in the laws enacted by Congress governing the disposition of the public domain and in compliance or tender of compliance with such laws on the part of defendant in error as far as was in his power through the wrongful act of the land officers. The acts of the defendant in error are fully set out in the

Findings of Fact. These facts are that on the 26th day of May, A. D. 1883, defendant in error, then being duly qualified to enter Government lands under the homestead laws, made *bona fide* settlement upon the lands involved in this suit, and on that date established his *bona fide* residence upon said land, and has ever since continued to reside thereon, and has maintained from the date of his settlement the actual, exclusive, and notorious possession thereof, and that during all of which time he has cultivated and improved the same and maintained his home upon said premises (Findings 1, 2, and 3); that he did not file upon the land at the date of his settlement because the township plat had not then been filed in the local land office; that on July 2, 1883, the township plat having been filed, the defendant in error went to the local land office with the intention of entering the land upon which he had made settlement as a homestead, and then and there requested the officers of said land office to allow his entry, but he was told a mistake had been made in the survey of the land, and that in all probability a resurvey thereof would be ordered; that it was unnecessary for him to protest or object to said survey or to file on said land, and thereupon the local officers advised him to wait until pending protests against the survey which were there on file should be determined (Findings 4 and 5); that defendant in error relied upon the representations so made to him by said officers (Finding 6); that on the 5th of August, 1884, he discovered that the land was claimed by the State of Minnesota, and on that date he made application to enter the land as a homestead under the laws of the United States, and tendered the local land officers the fees for making such entry; that then no adverse claim, other than the pretended claim of the State of Minnesota to said land as swamp

land, had arisen (Finding 7); that the local officers rejected his application to enter said land on the ground that the land inured to the State of Minnesota under the act of March 12, 1860, and that his application to enter said lands was not made within three months after the filing of the township plat in the local office (Finding 8). On the 9th of August, 1884, defendant in error filed his contest against the claim of the State of Minnesota in due form, and on the 26th of August, 1884, he appealed from the decision of the local officers rejecting his homestead application unto the Commissioner of the General Land Office, and his appeal was duly transmitted to the Commissioner of the General Land Office, August 26, 1884, and was by that office received and filed on or about September 1, 1884 (Findings 9 and 10); that while his appeal was pending and undetermined patent was, on the 23d day of January, 1885, issued to the State of Minnesota, through mistake and inadvertence (Finding 11); that he has improved the land during his residence, by the erection of a good and substantial dwelling-house, which was replaced by a second dwelling when the first was destroyed by fire, and that he has cleared and cultivated the land to crops from year to year (Findings 12 and 13).

Defendant in error performed the acts of settlement and residence required by the homestead laws; he was prevented from performing the acts of entry and final proof by the action of the officers of the Land Department. When the United States determined to give the land away, privity between the defendant in error and the United States arose when the defendant in error made his *bona fide* settlement thereon.

And *v. Brandon*, 156 U. S. 537.

Privity between the defendant in error and the United States does not rest upon a recognition by the officers of the Land Department of an asserted claim on the part of the defendant in error. The question of privity is determined by the laws enacted by Congress governing the disposition of the public domain, and in case of a homestead settler it exists when the law has been complied with or compliance has been tendered by a qualified settler in so far as the same is in his power.

II.

Answering the contention that the issuance of the patent to the State of Minnesota was an adjudication of the fact that the land is swamp land, if it be conceded that the patent was issued under the swamp-land laws, it is contended that the findings show distinctly that the appeal raising that very question by the defendant in error was never finally passed upon by the Land Department, and it nowhere appears that the patent was issued upon the determination that the land was swamp or overflowed land. But the findings show that as a matter of fact the land has never been swamp or overflowed land. It is not to be presumed that the officers of the Land Department decided the reverse to be the case when the contrary showing of defendant in error was then pending in the office of the Commissioner of the General Land Office, and no action thereon was had.

But it is not admitted that if the officers of the Land Department had decided this land to be swamp land, when in fact it was nothing of the kind and never had been, a court of equity is powerless to correct that mistake. This court has said in *Johnson v. Towsley*, cited *infra*, that: "It is fully conceded that when those officers decide

controverted questions of fact, in the absence of fraud or imposition or mistake their decision is final, except as they may be reversed on appeal in that Department." But if the officers of the Land Department held the land to be swamp land that was not the decision of a *controverted* question. There was no decision upon that question raised by defendant in error by his appeal which was pending when the patent was issued. If the question whether the land was swamp land was ever decided by the officers of the Land Department, it was decided *ex parte*, and does not fall under the above rule. The decision that the land was swamp land, if made, would fall within the further rule announced in the cited opinion: "But we are not prepared to concede that when in the application of facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of these laws, the courts are without power to give any relief."

After referring to the powers exercised by this court in reviewing the acts of the officers of the Land Department in refusing to interfere with the action of that Department so long as title remained in the Government, the court says, in the same opinion: "On the other hand, it has constantly asserted the right of the proper courts in inquiring, after the title has passed from the Government and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own or as trustee for another."

The contention of plaintiff in error cannot be correct that the officers of the Land Department have power to say that high and dry land is swamp land, and that the power exists in them, without authority of inquiry

by the courts, to dispose of high and dry land as swamp land in the presence of an entirely different intent on the part of Congress and to the impairment of the rights of *bona fide* settlers.

The rights of the defendant in error have never been finally passed upon by the officers of the Land Department; while seeking a determination of his rights that avenue was closed to him by the issuance of a patent.

The defendant in error having acquired a right under the law by his act of *bona fide* settlement, it was not in the power of the officers of the Land Department to take away that right by issuing a patent to the State of Minnesota.

III.

Throughout the proceedings it has been accepted as a fact that the land was patented to the State of Minnesota under the swamp-land laws. But the question at issue is the superior right of the defendant in error over any right of the patentee or those claiming under the patent. That superior right is shown by the facts as found. Wherefore the particular law under which the patent was mistakenly issued is not a material fact.

IV.

The mistake and inadvertence found and which actually exists is that of issuing a patent under any law or without law to the State of Minnesota in the presence of the superior right of defendant in error, acquired as set forth in the Findings of Fact; and that is the mistake and inadvertence corrected by the judgment of the court below.

V.

The remedy sought to be enforced in this action has been held by this court in numerous cases to be the proper one, ~~but~~ upon such an issue as that existing between the parties to this suit. The question involved is whether the case discloses equitable rights in the defendant in error superior to the claim of the plaintiff in error.

Silver v. Ladd, 74 U. S. 219.

Johnson v. Towsley, 80 U. S. 72.

In the opinion of this court in the latter case, announced by Justice Miller, the court said :

“And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, ‘a court of equity will,’ in the language of this court in the case of *Starks v. Starrs*, just cited, ‘convert him into a trustee of the true owner and compel him to convey the legal title.’ ”

Defendants in error cite in support of their contentions herein :

Brainard v. Ashley, 18 Howard, 43.

State of Minnesota v. Batcheller, 1 Wall. 115.

Shepley v. Cowan, 91 U. S. 330.

Sampson v. Smiley, 80 U. S. 91.

Morris v. Stackmaker, 104 U. S. 212.

Linley v. Hawes, 67 U. S. 265.

Cunningham v. Ashley Heirs, 14 Howard, 377.

Williams v. U. S., 138 U. S. 514.

Moore v. Robins, 96 U. S. 535.

Lyttle v. Arkansas, 9 How. U. S. 334.

Landdsale v. Daniels, 100 U. S. 113.

Respectfully submitted.

J. M. VALE,

Attorney for Defendant in Error.

JOHN BRENNAN,

of Counsel.

SUPPLEMENT TO BRIEF OF DEFENDANT IN ERROR.

Upon the first contention of plaintiff in error it is further submitted that no right attached to the State of Minnesota merely by reason of the force and effect of the acts of March 12, 1860, and September 30, 1850, because the lands are not nor never have been swamp or overflowed lands. (14th Finding.) The sole right of the State is the legal title acquired at the date of and under the patent to the State of January 23, 1885. (11th Finding.) The right of defendant in error attached at the date of his settlement, May 26, 1883. (2nd Finding.) At that date no other claim attached to the land. (7th Finding.) Privity between the United States and the defendant in error is an incident to his act of settlement under the homestead laws, and that privity has been maintained by his continued residence upon and improvement and cultivation of the land.

It was not incumbent upon the defendant in error to perform the vain act of offering final proof, because long before his final proof was due the land had been patented to the State of Minnesota, and all control over the title to the land by the Executive Department of the Government had ceased.

Moore v. Robbins, *supra*.

Sampson v. Smiley, *supra*.

Linley v. Haines, *supra*.

Cunningham v. Ashley Heirs, *supra*.

Ard v. Brandon, *supra*.

Hughes v. United States, 4 Wall. 232.

Quinn v. Chapman, 111 U. S. 445.

St. Louis Smelting Company v. Kemp, 104 U. S. 636.

U. S. v. Marshall Silver Mining Co., 129 U. S. 579.

Bisson v. Curry, 35 Iowa, 72.

Gilman v. Lapp, 100 Ill. 297.

Webber v. Pere Marquette Broom Co., 62 Mich. 626.

In Ard v. Brandon, *supra*, it was held that when a pre-emptor has the right to make entry and applies to the local officers and they refuse to recognize his application, his right will be deemed to date from the time of his application, and this, notwithstanding he proceeds to obtain title in some other way.

His application relates back to his date of settlement.

Roy's right by settlement attached prior to the filing of the plat of the survey, and consequently prior to any right of record which has ever attached to the land, because the land had been erroneously (or fraudulently) reported as swamp and overflowed land. Such survey could in no way affect the status of the land in its physical condition; that is, the mere act of survey could not make that swamp which nature had made high and dry.

But the plat of survey was filed in June, 1883; Roy settled in May, 1883. Finding 4 discloses that at the date of Roy's settlement the plat had not been filed in the local land office.

J. M. VALE,

Attorney for Defendant in Error.

Statement of the Case.

DULUTH AND IRON RANGE RAILROAD COMPANY v. ROY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 221. Submitted March 10, 1899. — Decided April 8, 1899.

When a patent of public lands is obtained by inadvertence and mistake, to the injury of a person who had previously initiated the steps required by law to obtain possession and ownership of such land, the courts, in a proper proceeding, will divest or control the title thereby acquired, either by compelling a conveyance to such person, or by quieting his title. The claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. *And v. Brandon*, 156 U. S. 537, is decisive of this case.

This is an action to quiet title to the northwest quarter of section number three, in township number sixty-one, north of range number fifteen west of the fourth P. M., State of Minnesota.

It was brought in the district court of the eleventh judicial district of the State against the plaintiff in error and one John Megins. One Moses D. Kenyon was afterwards made a party.

The pleadings consisted of the complaint, separate answers of the defendants and replies of the plaintiff, (defendant in error,) which respectively set up the titles, interests and claims of the parties. As there is no point made on them, they are omitted.

The case was tried by the court without a jury and full findings of fact made, and judgment rendered in favor of the plaintiff, (defendant in error,) adjudging and decreeing him to be the equitable owner of the lands in controversy, and that the defendants "and all persons claiming by or through or under them be and they are hereby forever barred and precluded from having or claiming any right, title, lien or interest in or to the said lands or any part thereof adverse to the plaintiff and parties claiming under him."

From this judgment an appeal was taken to the Supreme Court, by which it was affirmed. — 72 N. W. Rep. 794.

To the judgment of affirmance this writ of error is directed.

Statement of the Case.

The findings of the court established the following :

The lands were patented to the State of Minnesota by the United States as swamp and overflowed lands, and the plaintiff in error is the grantee of the State. The defendant in error claims under the homestead laws. At the time of the passage of the act of 1860, under which the patent was issued, the lands were not swamp, wet or overflowed, or unfit for cultivation, but were and now are "high, dry and fit for cultivation," except four or five acres in the northwest corner. In May, 1883, the defendant in error, then being qualified to do so, settled upon the lands with the *bona fide* intention of acquiring the same under the laws of the United States, established his residence thereon, and has ever since continued to be in the actual, exclusive and notorious possession, maintaining his home there, and cultivating and improving the same. When defendant in error commenced his residence on the lands the plat of the survey of the township in which they were located had not been filed, but was filed subsequently, and after it was filed, to wit, on the 2d of July, 1883, he went to the land office with the intention of entering the lands under the homestead laws, and made a request to do so, but the land officers informed him that there was a mistake in the survey, and that in all probability a new survey would be ordered; that numerous protests had been made against the survey which were sufficient to raise the question of its accuracy; that it was unnecessary for him to protest or file on the land, and advised him to wait until such protests were determined.

He was a foreigner, did not know the English language, nor was he familiar with the laws, rules and regulations relating to the disposition of the public lands, and relied upon the representations of the officers, and acted upon their advice.

On the 5th of August, 1884, he discovered that the State was claiming the lands as swamp lands; thereupon he duly made application to enter the same under the homestead laws, and tendered the fees to the local land officer. No adverse claim other than that of the State had arisen or was made to said lands, but his offer of entry was rejected on the ground

Opinion of the Court.

that the same had inured to the State under the act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the land office.

On the 6th of August, 1884, he duly filed contest, duly appealed from the rejection of his claim, which appeal and the affidavits attached were transmitted to the commissioner of the General Land Office, and were by him received and filed September 1, 1884.

On the 23d of January, 1885, and while the appeal and contest were pending, the lands, through mistake and inadvertence, were patented to the State of Minnesota. The defendants took conveyance of the lands with notice of the right, claim and interest of the plaintiff (defendant in error).

The assignments of error attack the conclusions of the state courts as erroneous, and specify as reasons (*a*) that the legal title to the lands was in plaintiff in error, and that there was no finding that there was a mistake of law or fraud on the part of the General Land Office of the United States or of any officers of the United States; (*b*) the finding that the patent to the State of Minnesota was issued through a mistake or inadvertence does not constitute a ground for adjudging defendant in error the equitable owner of the lands; (*c*) the defendant in error is not the real party in interest and never had the legal or equitable title to the land, the United States being the only party which could attack the patent to the State of Minnesota or invoke the action of the courts to determine its validity.

Mr. J. M. Wilson for plaintiff in error.

Mr. J. M. Vale and *Mr. John Brennan* for defendant in error.

MR. JUSTICE MCKENNA, after stating the facts, delivered the opinion of the court.

Do the facts entitle the defendant in error to the relief which was awarded him by the state courts?

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It is now too well established to need argument to support or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will divest or control the title, thereby acquired either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. And in two late cases, *Germania Iron Co. v. United States*, 165 U. S. 379; *Williams v. United States*, 138 U. S. 514, it was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

The plaintiff in error, however, contends that defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove or established, or even alleged in this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

This contention is attempted to be supported by the principles announced in *Bohall v. Dilla*, 114 U. S. 47; *Sparks v. Pierce*, 115 U. S. 408; *Lee v. Johnson*, 116 U. S. 48. The principles are that to enable one to attack a patent from the Government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it, and yet justify relief, as in *Ard v. Brandon*, 156 U. S. 537, and in *Morrison v. Stalnaker*, 104 U. S. 213. And because of the well-estab-

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lished principle that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. *Lytle v. Arkansas*, 9 How. 314.

It would be arbitrary to apply the principle to some acts and not to others — might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard *Ard v. Brandon* as decisive.

In that case the claimant against the patent, being qualified and entitled, offered to make final proof, and from the denial of the offer prosecuted appeals successively to the Commissioner of the General Land Office and the Secretary of the Interior, and each decided against him. In this case defendant in error, also being qualified and entitled, offered to enter the land, which offer was denied, and against the claim of the State of Minnesota he instituted a contest, which was pending in the General Land Office, when the patent was issued by inadvertence and mistake, and his right thereby defeated. We do not regard this difference in the cases substantial.

But it is urged defendant in error may not be able to make final proof, and that the Land Department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. Neither supposition can be indulged. The findings by the court show full qualification in the defendant in error and we cannot presume that the Land Department will find against the fact, which the state courts have found, that the lands "were not, at the time of the passage of the act of March 12, 1860, nor were they ever nor are they now, swamp, wet or overflowed, or unfit for cultivation."

In *Ard v. Brandon* relief was adjudged against title derived under patents — one from the State of land certified to it by the United States and one directly from the United States. Equally is the defendant in error entitled to relief against the title claimed by plaintiff in error.

Judgment affirmed.